Public Prosecutor v Multi Electrical Supply & Services & Ors

HIGH COURT (PENANG) — CRIMINAL APPLICATION NO PA-44–33–07 OF 2020
MOHD RADZI ABDUL HAMID JC
12 APRIL 2022

Criminal Procedure — Forfeiture — Money laundering — Public Prosecutor ('PP') sought court order under Anti-Money Laundering, Financing of Terrorism and Proceeds of Unlawful Activity Act 2001 ('the Act') to forfeit properties seized under s 50 of the Act — PP alleged properties were directly or indirectly linked to commission of predicate offence of online gambling — Whether PP wrongly relied upon s 4B of Common Gaming Houses Act 1953 ('CGHA') to establish offence of online gambling — Whether s 4B was solely concerned with offences relating to gaming machines — Whether misapplication of the law rendered the predicate offence on which the forfeiture application was based unproven — Whether the forfeiture application had to be dismissed — Whether bank account allegedly used in commission of offence of online gambling could not itself (as opposed to the monies in the account) be forfeited as it was not 'property', 'asset', 'thing' or 'instrumentality of an offence' capable of being forfeited under the Act

The applicant herein sought an order from the High Court under s 56(2) of the Anti-Money Laundering, Financing of Terrorism and Proceeds of Unlawful Activity Act 2001 ('the Act') to forfeit moveable and immoveable properties of the respondents which had earlier been seized on the ground that they were proceeds of unlawful activity, namely, online gaming or were instrumentalities in the commission of that offence. The applicant contended that the predicate offence of online gaming was contained in s 4B of the Common Gaming Houses Act 1953 ('the CGHA') and that by engaging in transactions that involved the proceeds of that unlawful activity, the appellants had committed the offence of money laundering under s 4(1) of the Act. Pursuant to s 50 of the Act, the applicant had earlier seized monies in the bank accounts of the respondents, their vehicles and, in one case, a landed property — all of which, the applicant said, were either instruments that were used in the carrying on of the offence of online gaming or were things that were acquired using the proceeds of that unlawful activity. Subsequent to the filing of the instant forfeiture application, 64 of the total 106 respondents entered into settlement agreements with the applicant and had their seized properties returned to them. Out of the remaining 42 respondents, only six of them challenged the forfeiture application on the grounds that: (a) s 4B of the CGHA did not establish the offence of online gambling and therefore the predicate offence for the offence of money laundering had not been proven; (b) the respondents' bank accounts (as opposed to the monies in them) could not be forfeited

because they were not 'property' or 'assets' or 'things' as defined under the Act and, in any case, the accounts had also been used for legitimate business activities (this argument arose because the applicant had requested the court to not just forfeit the monies in the accounts but also the accounts themselves so that the accounts could no longer be used in the commission of an unlawful activity); (c) the amount of monies the applicant sought to forfeit from the bank accounts was disproportionate to the actual amount of monies that were used in online gambling; (d) there was no nexus between the landed property and the offence of online gambling; and (e) the applicant had failed to prove that the monies in the bank accounts as well as the landed property had been substantially used to commit the offence of online gambling.

Held, dismissing the forfeiture application and ordering the immediate cancellation of the seizure orders on the landed property and the monies in the bank accounts of the respondents as listed in the Appendix attached to this judgment:

(1) On balance of probabilities, the applicant had failed to prove its case against the respondents to warrant the exercise of the court's powers of forfeiture under s 56(2) of the Act. The instant decision also applied for the benefit of the respondents who did not challenge the forfeiture application because the court's duty under s 56(4) of the Act demanded that it gave equal consideration to whether the bank accounts (and the monies in those accounts) of the non-disputing respondents could be forfeited. No provision in the Act empowered the court to grant the application in default of any challenge or dispute. In any event, the granting of such a default order — when this court had found no legal basis for the forfeiture application in the first place — would cause great injustice to the non-disputing respondents (see paras 107–109).

(2) The applicant had seriously misapplied the law by relying upon s 4B of the CGHA to prove the predicate offence of online gambling. Section 4B was not the penal provision that established the offence of online gambling. That section merely criminalised an act of, inter alia, dealing with, transacting in, importing, manufacturing, selling, servicing and repairing gaming machines or a combination of those activities. Nothing in that section related to online gambling. The fact that some of the respondents might have admitted to participating in online gambling using their bank accounts did not make those admissions proof of the commission of online gambling under s 4B of the CGHA (see paras 86, 102 & 105).

(3) Unlike ss 4, 6 and 7 of the CGHA which were related to the act of gaming, s 4B was a stand-alone provision that was unrelated to the act of gaming. Therefore, s 4B could not be read together with s 2 of the CGHA to support the proposition that the offence of online gambling could be

established. Since the proving of the unlawful activity stood on a wrong footing of the law, the applicant had failed to discharge the legal burden of proving, on balance of probabilities, that the respondents had committed the predicate offence of online gambling under s 4B of the CGHA and the money laundering offence under s 4(1) of the Act. This finding also applied to the respondent whose landed property was seized, in whose case the court additionally found no evidence that the property had been used in any way to commit the offence of online gambling. The mere fact that a loan was received by the property owner from a co-respondent to release the property from a previous loan did not make the property an instrument of an offence. That fact alone did not serve as the causal link or nexus between the property and the commission of the offence of online gambling (see paras 89 & 105–106).

(4) A bank account (as opposed to the monies in it) was not a 'thing', 'asset' or 'property' that could legally be an instrumentality of an offence under s 3 of the Act. Therefore, the bank accounts themselves could not be subjected to forfeiture under s 56(1)(d) of the Act. Whilst money standing credit in a bank account was an asset or property, a bank account itself was merely a facility that was applied for and accorded to a customer by the bank at its discretion. The customer did not acquire the account to the exclusion of any right of the bank over the same; nor did the account belong to the customer whether in terms of possession or ownership, nor did the account have any value in itself that could be converted into cash (see paras 67, 74 & 104).

(5) The entire evidence presented by the applicant related only to the acts of alleged online gambling and there was nothing directly or remotely related to dealing with or transacting in gaming machines under s 4B of the CGHA. The applicant therefore failed to apply the correct law in proving the predicate offence that was to serve as the basis for the forfeiture application. The law as it stood did not provide the authorities with the correct legislative tools to battle online gambling. The CGHA did not have any specific provision on online gambling and because of that, the term 'online gambling' was not defined. Section 4B CGHA was legally inapplicable and irrelevant to serve as the penal provision on online gambling and the use of that provision to support any prosecution or proceedings under the Act and other laws such as the Prevention of Crimes Act 1953 for an alleged offence of online gambling was a misconception, a misapplication and an abuse of the law. On equal footing, limb (b) to the definition of 'unlawful activity' could not assist the applicant in proving the existence of the offence, since there was no offence of online gambling under s 4B nor other parts of s 4 of the CGHA (see paras 81, 96 & 98).

[Bahasa Malaysia summary

Pemohon di sini memohon perintah daripada Mahkamah Tinggi di bawah s 56(2) Akta Pencegahan Pengubahan Wang Haram, Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 ('Akta tersebut') untuk melucut hak harta alih dan tak alih responden yang sebelum ini telah disita atas alasan bahawa ia adalah hasil daripada aktiviti yang menyalahi undang-undang, iaitu, perjudian dalam talian atau merupakan alat dalam melakukan kesalahan tersebut. Pemohon berhujah bahawa asas kesalahan permainan dalam talian terkandung dalam s 4B Akta Rumah Judi Terbuka 1953 ('ARJT') dan bahawa dengan terlibat dalam transaksi yang melibatkan hasil daripada aktiviti yang menyalahi undang-undang tersebut, perayu telah melakukan kesalahan pengubahan wang haram di bawah s 4(1) Akta. Menurut s 50 Akta tersebut, pemohon sebelum ini telah merampas wang dalam akaun bank responden, kenderaan mereka dan, dalam satu kes, hartanah — yang kesemuanya, yang dinyatakan pemohon, sama ada instrumen yang digunakan dalam menjalankan kesalahan perjudian dalam talian atau perkara yang diperoleh menggunakan hasil daripada aktiviti yang menyalahi undang-undang tersebut. Selepas pemfailan permohonan rampasan semasa, 64 daripada jumlah 106 responden telah menandatangani perjanjian penyelesaian dengan pemohon dan telah mengembalikan harta rampasan kepada mereka. Daripada baki 42 responden, hanya enam daripada mereka mencabar permohonan pelucuthakan tersebut atas alasan: (a) s 4B ARJT tidak membuktikan kesalahan perjudian dalam talian dan oleh itu asas kesalahan bagi kesalahan pengubahan wang haram belum dibuktikan; (b) akaun bank responden (berbanding dengan wang di dalamnya) tidak boleh dilucuthakkan kerana ia bukan 'harta' atau 'aset' atau 'benda' seperti yang ditakrifkan di bawah Akta dan, dalam apa jua keadaan, akaun tersebut telah juga telah digunakan untuk aktiviti perniagaan yang sah (hujah ini timbul kerana pemohon telah meminta Mahkamah untuk bukan sahaja kehilangan wang dalam akaun tetapi juga akaun tersebut sendiri supaya akaun tersebut tidak lagi boleh digunakan dalam melakukan aktiviti yang menyalahi undang-undang); (c) jumlah wang yang ingin dilucuthakkan oleh pemohon daripada akaun bank adalah tidak seimbang dengan jumlah sebenar wang yang digunakan dalam perjudian dalam talian; (d) tiada hubungan antara hartanah dan perjudian dalam talian; dan (e) pemohon telah gagal membuktikan bahawa wang dalam akaun bank serta hartanah telah digunakan dengan ketara untuk melakukan kesalahan perjudian dalam talian.

Diputuskan, menolak permohonan pelucuthakan dan memerintahkan pembatalan serta-merta perintah rampasan ke atas hartanah dan wang dalam akaun bank responden seperti yang disenaraikan dalam lampiran yang dilampirkan pada penghakiman ini:

(1) Berdasarkan imbangan kebarangkalian, pemohon telah gagal membuktikan kesnya terhadap responden untuk mewajarkan

pelaksanaan kuasa rampasan mahkamah di bawah s 56(2) Akta tersebut. Keputusan semasa tersebut juga terpakai untuk faedah responden yang tidak mencabar permohonan pelucuthakan kerana kewajipan mahkamah di bawah s 56(4) Akta menuntut supaya ia memberi pertimbangan yang sama kepada sama ada akaun bank (dan wang dalam akaun tersebut) daripada responden yang tidak mempertikaikan boleh dilucuthakkan. Tiada peruntukan dalam Akta yang memberi kuasa kepada mahkamah untuk membenarkan permohonan tersebut jika gagal dalam sebarang cabaran atau pertikaian. Dalam apa jua keadaan, pemberian perintah ingkar tersebut — apabila mahkamah ini tidak menemui asas undang-undang untuk permohonan pelucuthakan pada mulanya — akan menyebabkan ketidakadilan yang besar kepada responden yang tidak mempertikaikan (lihat perenggan 107–109).

(2) Pemohon telah menyalahgunakan undang-undang dengan serius dengan bergantung pada s 4B ARJT untuk membuktikan asas kesalahan perjudian dalam talian. Seksyen 4B bukanlah peruntukan keseksaan yang membuktikan kesalahan perjudian dalam talian. Seksyen tersebut hanya menyatakan kesan jenayah perbuatan, antara lain, berurusan dengan, berurus niaga, mengimport, mengilang, menjual, menservis dan membaiki mesin permainan atau gabungan aktiviti tersebut. Tiada apa-apa dalam bahagian tersebut yang berkaitan dengan perjudian dalam talian. Hakikat bahawa sesetengah responden mungkin mengaku menyertai perjudian dalam talian menggunakan akaun bank mereka tidak menjadikan pengakuan tersebut sebagai bukti komisen perjudian dalam talian di bawah s 4B ARJT (lihat perenggan 86, 102 & 105).

(3) Tidak seperti ss 4, 6 dan 7 ARJT yang berkaitan dengan tindakan perjudian, s 4B adalah peruntukan yang berdiri sendiri yang tidak berkaitan dengan tindakan perjudian. Oleh itu, s 4B tidak boleh dibaca bersama s 2 ARJT untuk menyokong usul bahawa kesalahan perjudian dalam talian boleh diwujudkan. Memandangkan pembuktian aktiviti yang menyalahi undang-undang tersebut berada di atas landasan undang-undang yang salah, pemohon telah gagal untuk melepaskan beban undang-undang untuk membuktikan, berdasarkan imbangan kebarangkalian, bahawa responden telah melakukan asas kesalahan perjudian dalam talian di bawah s 4B ARJT dan kesalahan pengubahan wang haram di bawah s 4(1) Akta tersebut. Dapatan ini juga terpakai kepada responden yang hartanahnya telah dirampas, yang dalam kesnya mahkamah juga tidak menemui bukti bahawa harta tersebut telah digunakan dalam apa jua cara untuk melakukan kesalahan perjudian dalam talian. Fakta semata-mata bahawa pinjaman diterima oleh pemilik harta daripada responden bersama untuk melepaskan harta daripada pinjaman sebelumnya tidak menjadikan harta tersebut sebagai instrumen kesalahan. Fakta itu sahaja tidak berfungsi sebagai pautan sebab musabab atau hubungan antara harta tersebut dan pelakuan

kesalahan perjudian dalam talian (lihat perenggan 89 & 105–106).

(4) Akaun bank (berbanding dengan wang di dalamnya) bukanlah 'benda', 'aset' atau 'harta' yang secara sah boleh menjadi instrumen kesalahan di bawah s 3 Akta. Oleh itu, akaun bank tersebut sendiri tidak boleh dilucuthakkan di bawah s 56(1)(d) Akta tersebut. Walaupun kredit simpanan wang dalam akaun bank adalah aset atau harta, akaun bank tersebut sendiri hanyalah kemudahan yang dipohon dan diberikan kepada pelanggan oleh bank mengikut budi bicaranya. Pelanggan tidak memperoleh akaun tersebut dengan mengecualikan mana-mana hak bank ke atas akaun tersebut; akaun itu juga bukan milik pelanggan sama ada dari segi pemilikan atau hak, mahupun akaun tersebut mempunyai nilai sendiri yang boleh ditukar kepada tunai (lihat perenggan 67, 74 & 104).

(5) Keseluruhan keterangan yang dikemukakan oleh pemohon hanya berkaitan dengan perbuatan yang didakwa perjudian dalam talian dan tiada apa-apa yang berkaitan secara langsung atau jauh dengan berurusan dengan atau berurus niaga dalam mesin permainan di bawah s 4B ARJT. Oleh itu, pemohon gagal menggunakan undang-undang yang betul dalam membuktikan asas kesalahan yang akan menjadi asas bagi permohonan pelucuthakan. Undang-undang yang sedia ada tidak memberikan pihak berkuasa alat perundangan yang betul untuk memerangi perjudian dalam talian. ARJT tidak mempunyai sebarang peruntukan khusus mengenai perjudian dalam talian dan disebabkan itu, istilah 'perjudian dalam talian' tidak ditakrifkan. Seksyen 4B ARJT adalah tidak terpakai di sisi undang-undang dan tidak relevan untuk dijadikan sebagai peruntukan penalti ke atas perjudian dalam talian dan penggunaan peruntukan itu untuk menyokong sebarang pendakwaan atau prosiding di bawah Akta dan undang-undang lain seperti Akta Pencegahan Jenayah 1953 bagi kesalahan yang didakwa perjudian dalam talian adalah salah tanggapan, salah guna dan penyalahgunaan undang-undang. Pada kedudukan yang sama, anggota (b) kepada takrif 'aktiviti yang menyalahi undang-undang' tidak dapat membantu pemohon dalam membuktikan kewujudan kesalahan itu, kerana tiada kesalahan perjudian dalam talian di bawah s 4B atau bahagian lain s 4 ARJT (lihat perenggan 81, 96 & 98).]

Cases referred to

Badan Perhubungan Umno Negeri Pahang v PP and other appeals [2022] 2 MLJ 572; [2022] CLJ 364, CA (refd)

Bekalan Sains P&C Sdn Bhd v Bank Bumiputra Malaysia Bhd [2011] 5 MLJ 1; [2011] 1 LNS 232, CA (refd)

Bungsar Hill Holdings Sdn Bhd v Damansara Realty Bhd [2019] MLJU 222; [2019] 4 CLJ 429, FC (refd)

Che Man bin Che Mud v PP [1994] MLJU 354; [1994] 4 CLJ 823, HC (refd)

A *Chen De Wei v Lembaga Pencegahan Jenayah & Ors* [2021] MLJU 1912; [2021] 1 LNS 1490, HC (refd)
Director of Public Prosecutions (DPP) (NSW) v King (2000) 49 NSWLR 727; (2000) 114 A Crim R 14, SC (refd)
Folley v Hill (1848) 2 HLC 28 (refd)
B *Jamaluddin bin Mohd Radzi & Ors v Sivakumar a/l Varatharaju Naidu (claimed as Yang Dipertua Dewan Negeri Perak Darul Ridzuan), Election Commission, intervener* [2009] 4 MLJ 593; [2009] 4 CLJ 347, FC (refd)
Khoo Kim Hock, Re [1974] 2 MLJ 29; [1974] 1 LNS 134 (refd)
Lan Limiao & Ors v Inspector Mohammad Hafifi bin Zailan & Ors [2020]
C MLJU 130; [2020] 1 LNS 2205, HC (refd)
Lau Hieng Yee, a bankrupt, In the matter of [2000] 1 MLJ 59; [1999] 4 CLJ 582, HC (refd)
Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals [2022] 3 MLJ 203; [2022] 3 CLJ 177, FC (refd)
D *Li Shishun v Osman Affendi bin Mohd Shalleh & Ors* [2021] MLJU 1292; [2021] 9 CLJ 789, HC (refd)
Menteri Hal Ehwal Dalam Negeri v Raja Petra bin Raja Kamarudin [2009] 4 MLJ 484; [2009] 3 CLJ 513, FC (refd)
Mohunram and another v National Director of Public Prosecutions and
E *another* [2007] ZACC 4 (folld)
National Director of Public Prosecutions v Kalmar Industries SA (Pty) Ltd [2017] ZASCA 142 (refd)
National Director of Public Prosecutions v Parker [2005] ZASCA 124 (refd)
National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd [2004]
F ZASCA 36 (refd)
Noor Ismahanum Mohd Ismail v PP [2019] 2 MLJ 536; [2018] 10 CLJ 597, CA (refd)
PP v Awalluddin bin Sham Bokhari [2018] 2 MLJ 401; [2018] 1 CLJ 305, FC (refd)
G *PP v Datuk Tan Cheng Swee & Ors* [1979] 1 MLJ 166, FC (refd)
PP v Kuala Dimensi Sdn Bhd & Ors [2021] 2 MLJ 469; [2021] 3 CLJ 198, FC (refd)
PP v Kuala Dimensi Sdn Bhd & Ors [2018] 6 MLJ 37; [2019] 3 CLJ 650, CA (refd)
H *PP v Woo Lee Lee* [2021] MLJU 1369; [2021] 1 LNS 1203, HC (refd)
R v Nelson; R v Pathak; R v Paulet [2010] 4 All ER 666; [2009] EWCA Crim 1573; [2010] QB 678, CA (folld)
R v Shabir [2008] EWCA Crim 1809; [2009] 1 Cr App Rep (S) 497; [2008] All ER (D) 414 (Jul), CA (folld)
I *R v Ward, Marles and Graham* [1989] 1 Qd R 194 (folld)
Standard Chartered Bank v Tiong Ngit Ting (f) [1998] 5 MLJ 220 ; [1997] 5 CLJ 552, HC (refd)
Tan Boon Kean v PP [1995] 3 MLJ 514; [1995] 4 CLJ 456, FC (refd)
Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases [2021] 3

MLJ 759; [2021] 5 CLJ 581, FC (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 3, 4(1), 16, 18, 32, 45(2), 50, 50(1), 51(1), 56, 56(1), (1)(c), (1)(d), (2), (4), 61, 61(3), (4)(c), (4)(e), 70(1), Second Schedule
Bankruptcy Act 1967 (now Insolvency Act 1967) s 2
Betting Act 1953
Common Gaming Houses Act 1953 ss 4, 4(1)(a), (1)(b), (1)(c), (1)(g), 4A, 4B, 4B(a), (b), 6, 7
Confiscation of Proceeds of Crime Act 1989 [AU]
Federal Constitution art 13
Financial Services Act 2013 ss 3, 123, 124
Interpretation Acts 1948 and 1967 s 3
Prevention of Crime Act 1959 s 15
Penal Code s 22
Proceeds of Crimes Act 2002 [AU] ss 329 , 329(2), 330, 338
Prevention of Organised Crime Act 1998 [SA] ss 1, 50(1)(a)
Proceeds of Crimes Act 2002 [UK] ss 242, 444, Chapter 4
Rules of Court 2012 O 7 r 2(1)

Syafinas bt Shabudin (Deputy Public Prosecutor, Attorney General's Chambers) for the applicant.
Akmal Jusoh (Shah & Hurrie) for the 28th respondent.
Keppy Wong (Keppy Wong & Assoc) for the 35th respondent.
Guok Ngek Seong (with Peter Siew) (Guok Partnership) for the 43rd and 70th respondents.
Lee Swee Meng (with Ivan Lee Fei and Pung Jenn Jiang) (SM Lee & Co) for the 68th and 102nd respondents.
Jagjit Singh (Jagjit Ariff & Co) for the 91st respondent.
Noraini bt Yacob (Sidek Teoh Wong & Dennis) for the third party.

Mohd Radzi Abdul Hamid JC:

INTRODUCTION

[1] The public prosecutor ('applicant') filed an application under s 56(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLFTA') by way of a notice of motion as appearing in encl 1. Essentially the applicant prayed for this court to grant an order under s 56(2) of the AMLFTA for the forfeiture of monies in bank accounts and of certain movable and immovable properties belonging to the respective respondents named in the notice of motion ('application').

[2] The application is supported by the affidavits of Syafinas bt Shabudin for the applicant (encl 2), Sarjan Mohd Fadzlee bin Mohd Khalid as the Predicate Offence Investigating Officer (encl 3), and Insp Sopawan a/p Kin as the AMLFTA Investigating Officer (encl 8).

[3] The application is premised on the grounds that: (a) each of the respondent had committed the predicate offence of participating in, receiving proceeds from and making payments for an unlawful activity of online gambling under s 4B of the Common Gaming Houses Act 1953 ('the CGHA'); (b) that the respondents' bank accounts were used to receive unlawful proceeds arising from that unlawful activity and further, that the bank accounts and the properties (where it applied) were used as the instrumentalities of an offence as provided under s 56(1) of the AMLFTA; and (c) that the said unlawful activity and the instruments of offence are also subject matter or evidence relating to commissioning of the offence of money laundering under s 4(1) of the AMLFTA.

[4] As a precursor to this application the applicant had issued against each of respondents (with exception of respondents 102, 103, 105 and 106 against whom seizures of immovable and moveable property were also made) the relevant orders pursuant to s 50(1) of the AMLFTA for the seizure of all monies in their respective bank accounts (encl 10 — exh SK2).

[5] With respect to respondent 102, an order for seizure of a landed property known as (Lot 170) No 46 , Jalan Cinta Alam, Country Heights, 43000 Kajang, Selangor, held under title GRN 222387 Lot 21834, Bandar Country Heights, Daerah Kuala Langat, Negeri Selangor under s 51(1) of the AMLFTA was obtained on 4 February 2020 (encl 10 — exh SK3) ('property'). With respect to respondents 103, 105 and 106, on 18 December 2019 the Predicate Investigating Officer had pursuant to s 45(2) of the AMLFTA seized two vehicles from respondent 103, one vehicle from respondent 104, one vehicle from respondent 105 and one vehicle from respondent 106 ('vehicles') (encl 10 — exh SK4).

STATUS OF RESPONDENTS

[6] Since the date of the filing of the application, all those respondents numbers 1–3, 5, 8, 10–13, 16–20, 22–23, 29–30, 34, 36, 40, 44–45, 47, 49–56, 58–59, 62–65, 72–75, 80–85, 88–94, 96–97, 99–101 and 103–106 had chosen to enter into settlement terms with the applicant and the respective orders were made on 31 March 2021, 20 April 2021, 22 September 2021, 13 October 2021, 10 December 2021 and 6 January 2022 (encls 320, 321, 384, 390, 391 and 392). The vehicles have been released to the relevant respondents as part of the terms of settlement.

[7] No settlement was reached between respondents 28, 35, 43, 68, 70 and 102 and for that reason these respondents continue to dispute the application ('disputing respondents'). A

[8] As for respondents 4, 6–7, 9, 14–15, 21, 24–27, 31–33, 37–39, 41–42, 46, 48, 57, 60–61, 66–67, 69, 71, 76–79, 86–87, 95 and 98 no action was taken to dispute the application ('non-disputing respondents'). B

DISPUTE BY DISPUTING RESPONDENTS

[9] Each of the disputing respondents had filed their respective affidavits in reply to the affidavits in support of the application as follows: (a) for respondent 28: encl 251; (b) for respondent 35: encl 269; (c) for respondent 43: encl 260; (d) for respondent 68: encl 308 and 328; (e) for respondent 70: encl 259; and (f) for respondent 102: encls 254 and 324. C D

[10] On 13 October 2021 this court heard oral submissions from the respective parties based on each of their written submissions. During the course of submissions the applicant took the position and asserted its intention to rely on limb (d) of s 56(1) of the AMLFTA to forfeit all the bank accounts (not just monies in the bank accounts) belonging to each of the disputing respondents and non-disputing respondents ('bank accounts') and the property belonging to respondent 102 as being instrumentalities in the commission of the predicate offence under s 4B of the CGHA. Those monies and property constituted proceeds of unlawful activity as defined under s 3 of the AMLFTA. The common issues of contention raised by all the disputing respondents are that: (a) the applicant failed to prove the predicate offence against all the disputing respondents; and (b) the applicant failed to prove that the monies in the bank accounts and the property were used as instrumentalities of an offence. E F G

[11] In the process of deliberating on the arguments of all the parties post the 13 October 2021 hearing, this court felt it was necessary to conduct a pre-decision case management hearing on 7 March 2022 to confirm the position taken by the applicant with regards to s 56(1)(d) of the AMLFTA so as to avert any misdirection by this court in arriving at its decision. This step was taken after this court noticed that the intitulement in encl 1 did not specifically state s 56(1)(d) of the AMLFTA and the prayer under prayer (3) (which should be ('2')) and paras 1.1–1.121 of encl 8 referred only to the monies in those accounts as the target for forfeiture but not the bank accounts. H I

[12] At the case management hearing the applicant confirmed that notwithstanding the intitulement in the notice of motion in encl 1 did not specifically state reference to s 56(1)(d) of the AMLFTA, it was the position

taken by the applicant that it intended to pursue the forfeiture of the bank accounts specifically (with exception to respondent 102 where the forfeiture is against property) because those accounts served as the instrumentalities of the predicate offence of online gambling under s 4B of the CGHA. As submitted by learned deputy public prosecutor on 13 October 2021, the forfeiture is aimed at affirmatively deterring the public from participating in illegal online gambling which has become very rampant. By forfeiting the bank accounts, the applicant will not only be successful in forfeiting the monies but will also be able to close all the bank accounts and deprive the respondents further use of the bank accounts in the commission of an unlawful activity.

[13] With regards to respondent number 102 the property in question is said to have benefitted from a loan derived from unlawful proceeds from online gambling originating from the respondent 1, 83 and 91. It was submitted that the property therefore constituted an instrumentality of an offence and must be forfeited.

[14] At the direction of this court parties then filed further written submissions on the issue of instrumentalities of an offence and whether s 4B of the CGHA establishes the offence of online gambling. What emerged from the submissions of the disputing respondents were the contentions that, inter alia: (a) the applicant had the onus to prove that the bank accounts and the property were substantially used and not merely incidental to the commission of the offence; (b) the bank accounts were not instrumental but merely incidental to the commission of the offence as they were also used for legitimate business purposes and therefore the bank accounts cannot be subject to forfeiture; (c) the forfeiture of the bank accounts must be proportional to the amount of monies that was actually used in online gambling and in the instant case the forfeiture is not proportional to the actual amount of monies used for online gambling; (d) a bank account is not a property under s 3 of the AMLFTA; (e) there was no nexus between the property and the offence of online gambling; (f) respondent 102 had no knowledge of the source of the funds as they were channeled through a firm of solicitors and therefore the respondent was entitled to assume and believe that since the funds were channeled through solicitors, the source and nature of the funds were legal; and (g) s 4B of the CGHA do not establish the offence of online gambling and therefore the predicate offence under that provision has not been proven.

[15] Through a letter dated 21 March 2022, learned counsel for respondent 28 had raised preliminary objections to the applicant's move to rely on s 56(1)(d) in this application. The objections are that: (a) the applicant failed to state specifically the intended use of s 56(1)(d) in the intitulement of encl 1; (b) based on encls 1, 2 and 8 the applicant had shifted their position mid-way in the course of proceedings from relying on s 56(1)(c) and 56(1)(d) of the

AMLFTA and this had prejudiced the respondent in responding to the application; and (c) the notice of motion in encl 1 is defective for want of compliance with O 7 r 2(1) of the Rules of Court 2012 on the particularisation of the particular rule of court and provisions of law under which the court is being moved.

[16] After considering the preliminary objections, this court holds the view that the change in position taken by the applicant from relying on s 56(1)(c) to 56(1)(d) of the AMLFTA did not prejudice respondent 28 as the matter of forfeiture of the bank accounts was actually addressed in paras 6 and 13(v) of encl 2. Whilst this court agrees that there was a failure to comply with O 7 r 2(1) of the Rules of Court 2012, the matter relating to s 56(1)(d) was raised by the applicant on 13 October 2021 during oral submissions by parties, some six months before this court was scheduled to deliver its decision. Therefore, there was ample opportunity for respondent 28 to respond to the issue and as such respondent 28 could not be said to have been surprised, misled or embarrassed by the position taken by the applicant at the eleventh hour. In fact, at para 13(v) of encl 2, the applicant did make reference to the bank accounts as instrumentalities of an offence although no specific reference to s 56(1)(d) was made. For those reasons the preliminary objections are dismissed.

ISSUES TO BE DETERMINED

[17] The distillation of all the issues and arguments raised by respective parties in both their written and oral submissions lead this court to the determination of the following prime issues:

(a) whether a bank account is instrumentalities of an offence under s 3 and can be subject of a forfeiture under s 56(1)(d) of the AMLFTA;

(b) whether s 4B of the CGHA establishes the offence of online gambling;

(c) whether the applicant can rely on s 4B of the CGHA in proving the predicate offence of online gambling;

(d) whether the property is instrumentalities of an offence; and

(e) whether the applicant succeeded, on the balance of probabilities, in proving its case under this application against all the disputing respondent and non-disputing respondents, and warranting the exercise of this court's powers under s 56(2) of the AMLFTA to grant the order of forfeiture against the bank accounts and the property.

A DELIBERATIONS AND ANALYSIS

Section 56(1) of the AMLFTA

B **[18]** It is fundamental as decided in *Public Prosecutor v Kuala Dimensi Sdn Bhd & Ors* [2021] 2 MLJ 469; [2021] 3 CLJ 198 and *Noor Ismahanum Mohd Ismail v Public Prosecutor* [2019] 2 MLJ 536; [2018] 10 CLJ 597 that the judge's primary concern in considering an application under s 56(1) is the legal status of the property that is sought to be forfeited and not whether the respondent is guilty of an offence under s 4(1) of the same law. The burden of C proof is on the balance of probabilities as used in civil proceedings (see s 56(4) of the AMLFTA and *Public Prosecutor v Awalluddin bin Sham Bokhari* [2018] 2 MLJ 401; [2018] 1 CLJ 305). Thus the judge must satisfy himself, on the balance of probabilities, that the property sought to be forfeited falls under any of the limbs under section 56(1), and in the present application under limb (d). D

Pre-conditions

[19] Before proceeding to deliberate on the more substantive aspects of this E application, it is part of the duty of this court to first determine if the pre-conditions to the application of s 56(1) have been satisfied, which are:

(a) a *Gazette* pursuant to s 61 of the AMLFTA has been published;

(b) there is no prosecution or conviction for an offence under s 4(1) of the F AMLFTA or for a terrorism financing offence;

(c) the application is made before the expiry of 12 months from the date of seizure and if there is a freezing order before expiry of 12 months from the date of the freezing order; and

G (d) there is no claim by bona fide third parties to the subject matter of the forfeiture.

[20] With respect to the *Gazette*, this court granted the order on 7 September 2021 for a third party notice to be published in a *Gazette*. The *Gazette* was H published on 25 January 2022 via *Gazette* PU (B) 56/2022.

[21] As confirmed by Syafinas bt Mohd Shabudin for the applicant at para 12 of encl 2, there has not been a prosecution or conviction of any of the disputing respondents or the non-disputing respondents under s 4(1) of the I AMLFTA or for a terrorism financing offence.

[22] The orders for: (a) seizure of the monies in the respective disputing respondents' and non-disputing respondents' bank accounts were issued pursuant to s 50(1) of the AMLFTA between 27 September 2019 until 10 June

2020; and (b) seizure of the property belonging to respondent 102 pursuant to s 51(1) of the AMLFTA was made on 4 February 2020. The notice of motion was filed on 4 July 2020 which means the application was made within the 12 months period.

[23] There is no third claim party against: (a) any of the monies in the bank accounts of the disputing and non-disputing respondents; and (b) the property belonging to respondent 102. There was however a third party claim by Maybank Islamic Bhd against monies held by respondent 91 in Maybank Islamic Banking Bhd bank account number 562526510276. The third party claim was resolved on 7 April 2022 through mutually agreed terms and the relevant order granted by this court.

Background discussion on the laws pertaining to instrumentalities of an offence and AMLFTA

[24] To begin with, Malaysia became a signatory to the United Nations Convention against Corruption ('UNCAC') on 9 December 2003 and had ratified the same on 24 September 2008. The UNCAC is a legally binding multilateral treaty that addresses the need for member countries to provide for preventive and punitive measures against corruption. Article 31(1)(b) of UNCAC on freezing, seizure and confiscation of proceeds of crime, properties, equipment or instrumentalities of an offence stipulates the obligations of member states to provide within its domestic law measures for the confiscation of proceeds of crime, properties, equipment or other instrumentalities used in or destined for use in offences. Article 31(2) provides that the member country shall take measures to identify, trace, freeze and seize such instrumentalities for eventual confiscation. Whilst article 2 of UNCAC defines the term 'property' it does not however, define the term 'instrumentalities'.

[25] Malaysia also works with the United Nations Office on Drugs and Crime ('UNODC') on efforts in fighting drug related crimes. In 2012 UNODC published a 'Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime' ('Manual'). The purpose of the Manual is to facilitate recovery of criminal assets and the Manual is to be used in conjunction with the United Nations Convention on Transnational Organised Crime ('UNTOC') (to which Malaysia became a party on 26 September 2002 and eventually ratified the Treaty on 24 September 2004) and the Manual on Mutual Legal Assistance and Extradition between member states. The UNODC acts as the custodian of UNTOC and its protocols. Article 2 of UNTOC has a similar provision to that of article 2 of the UNCAC on the definition of 'property' and like UNCAC, UNTOC does not provide for a definition for the term 'instrumentalities'. The Manual however, does provide for a definition of 'instrumentalities' under Chapter I which means 'the assets

A used to facilitate crime, such as a car or a boat used to transport narcotics'. That definition appears to be very general but provides the idea that instrumentalities are things or objects used in the committing of crime.

B **[26]** In 2009, UNODC published the 'Model Provisions on Money Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime for Common Law Legal Systems' ('Model') which was then revised and updated in 2016. The model provisions were crafted as a result of a collaboration between the Commonwealth Secretariat, the International C Monetary Fund and UNODC. Under section 38 Part V of that Model, 'instrumentality' and 'instrumentalities' means 'any property used or intended to be used, in any manner, wholly or in part, to commit [alternatively: in or in connection with the commission of] a criminal offence or criminal offences and shall include property that is used in or intended or allocated for use in the D financing or terrorism or terrorist acts available for use by a terrorist organisations'.

[27] Referring next to the United Kingdom Proceeds of Crimes Act 2002 ('the UKPOCA'), the forfeiture or confiscation (being the term used under E UKPOCA) regime under the UKPOCA is different in that the confiscation is focused on the benefit derived from the criminal act and not against the instrumentalities of an offence. In relation to a civil forfeiture, the recoverable property is property that was obtained: (a) through the unlawful conduct, example by stealing; or (b) obtained in return for the conduct, example being F paid to commit an unlawful conduct (see s 242 of the UKPOCA). Therefore the confiscation is on the product of or payment for the unlawful act and not the instrument used to commit the act (see Chapter 4 of the UKPOCA). Notwithstanding that the forfeiture of instrumentalities of an offence is not featured in the UKPOCA for domestic confiscations, s 444 of the Act G recognises the function to aid requests by external countries for the forfeiture of instrumentalities of an offence. The Explanatory Notes to s 444 refers to instrumentalities as 'items used or intended for use in the commission of a crime' and this reflects the definition provided in article 2 of the Directive 2014/42/EU dated 3 April 2014 of the European Parliament and of the H Council of the European Union on The Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union, which states that 'instrumentalities' is 'any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences'. That definition substantially mirrors the definition proposed by the UNODC I in the Model referred earlier.

[28] Looking next to the Republic of South Africa, s 1 of the Prevention of Organised Crime Act 1998 ('the SAPOCA') provides that an instrumentality of an offence means 'any property which is concerned in or suspected

commission of an offence, whether within the Republic or elsewhere'. This definition envisages that the property that can be forfeited under s 50(1)(a) of the SAPOCA is not limited to property that is used in the actual commission of an offence but extends also to property suspected only to have been used in the commission of an offence.

[29] Moving across to Australia, the Australian Proceeds of Crimes Act 2002 ('the APOCA') offers, in comparison to UNCAC, the UKPOCA, the SAPOCA and the Model, more extensive provisions of the subject of instrumentalities of an offence. Section 329(2) of the APOCA provides that 'property' is an instrument of an offence if '(a) the property is used in, or in connection with, the commission of an offence; or (b) the property is intended to be used in, or in connection with the commission of an offence whether the property is situated in or outside Australia'. What is interesting to note is that s 329 of the APOCA makes a distinction between instrument of an unlawful activity and the instrument of an offence where the former is described as instrument of the offence constituted by the act or omission that constitutes the unlawful activity.

[30] Returning home, s 56(1)(d) of the AMLFTA is not original to the Act. It came later by way of an amendment via PU (A) 1467 which came into force on 1 September 2014. A full narration on the history of the amendment to s 56 can be found in the Court of Appeal decision in *Public Prosecutor v Kuala Dimensi Sdn Bhd & Ors* [2018] 6 MLJ 37; [2019] 3 CLJ 650. To add to that narration, the Explanatory Statement to the Amendment Bill stated that the Government of Malaysia intended to extend the scope of the AMLFTA to deal with proceeds with unlawful activity and instrumentalities of an offence and the amendment to s 56, amongst others, was to extend the power to freeze, seize and forfeit property that is reasonably suspected to be the proceeds of an unlawful activity and the instrumentalities of an offence.

[31] A comparison to the legal resources referred earlier shows that the definition of 'instrumentalities of an offence' under s 3 of the AMLFTA is quite similar to s 329 of the APOCA with the exception that: (a) apart from property, s 3 has also included 'any thing' as an instrument of an offence; and (b) the thing or property may have been wholly or partly used as an instrument. Thus, s 3 structures the meaning of 'instrumentalities of an offence' as follows:

> (a) any thing which is used in, or in connection with, the commission of any unlawful activity; or
>
> (b) any property which is wholly or partly used in, or in connection with, the commission of any unlawful activity,
>
> whether the thing or property is situated within or outside Malaysia;

[32] Whilst the language used in defining the term 'instrumentalities' under s 3 is quite plain and clear, yet neither s 3 nor s 56(1)(d) describes how a 'thing' or 'property' acquires the legal characteristics of an instrument of an offence, for example does the incidental or ancillary use of that thing or property sufficient or must that thing or property be integral or essential to the commissioning of the offence or its intended use such that without that that thing or property the offence could not have been carried out or completed.

[33] Like AMLFTA, APOCA does not describe how substantial must the thing or property have been used in or connected with the commission of an offence for it to be an instrument of an offence. However, s 330 of the APOCA does provide that a property that is initially not the primary instrument of offence can become an instrument of an offence when:

> (a) the property is wholly or partly derived or realised from the disposal or other dealing with an *instrument of the offence; or
>
> (b) the property is wholly or partly acquired using an instrument of the offence; or
>
> (c) an *encumbrance or a security on, or a liability incurred to acquire, retain, maintain or make *improvements to, the property is wholly or partly discharged using an instrument of the offence; or
>
> (d) the costs of retaining, maintaining or making improvements to the property are wholly or partly met using an instrument of the offence; or
>
> (e) the property is improved using an instrument of the offence; including because of one or more previous applications of this section ...

[34] Moving on, the definition of 'instrumentalities' under s 3 refers to 'any thing' or 'property' that is: (a) used in; (b) in connection with; and (c) the commission of any unlawful activity. Whilst the words 'used in' is plain and clear, the remainder of the words require some deliberation. The meaning of the words 'in connection with' in the context of s 56(1) of the AMLFTA was clarified by the Court of Appeal in *Public Prosecutor v Kuala Dimensi Sdn Bhd & Ors* where Suraya Othman JCA in speaking for the court referred to the English decision in *R v Ward, Marles and Graham* [1989] 1 Qd R 194 which held that:

> ... there must be a substantial connection between the money and the offence — not a mere accidental or incidental connection with the commission of that offence. There must therefore be in a very real sense a substantial connection between the use of the property and the actual commission of the offence in the sense that THE commission of the offence is related to or, is dependent upon or could not have been committed without or resulted directly from the use of the property.

[35] The word 'commission' as defined by Cambridge Dictionary includes 'the act of committing a crime' (see https://dictionary.cambridge.org/dictionary/english/commission). Lexico defines the same word to mean 'the action of committing a crime or offence' (see https://www.lexico.com/definition/commission). Thus, guided by the judicial interpretation to the meaning of 'in connection with' in *R v Ward, Marles and Graham*, for the 'thing' or 'property' to be an instrumentality of an offence it must have been substantially used in the act of committing the unlawful activity and not merely accidental or incidental to that act.

[36] For the sake of a wider analysis on the matter references are also made to judicial decisions in Australia and South Africa. Referring first to the decision of *Director of Public Prosecutions (DPP) (NSW) v King* (2000) 49 NSWLR 727; (2000) 114 A Crim R 14, the Supreme Court of New South Wales was presented with the issue on the extent and effect of the words 'used' and 'in connection with' the commissioning of an offence under the Confiscation of Proceeds of Crime Act 1989. In his judgment O'Keef J held:

> [14] The fact that the definition of tainted property deals with two different concepts, namely 'used in the commission' and 'used in connection with the commission' of a serious offence, indicates that the latter phrase has a wider connotation than the former. This view is supported by authority (*R v Polain* (1989) 52 SASR 526 at 531–532 per Cox J; *Taylor v AG* (1991) 52 A Crim R 166 at 174–175 per Debelle J). There must however be a relationship between the commission of the offence and the property in question. That relationship need not be substantial or direct (*R v Hadadd* (1989) 16 NSWLR 476; *Sultana* (1992) 74 A Crim R 27), but the need for a connection poses questions of proximity and decree 'and must be understood in the light of the word 'used'. The resolution of the question of proximity and degree posed by the section is essentially a question of fact (*Sultana* supra at 39 per Sully J).
>
> [20] This analysis in my opinion, shows the importance of considering each of the elements in the composite phrase, namely, the word 'used', the phrase 'in connection with' and the further phrase 'the commission of a serious offence' and to consider such elements in the context of and as together constituting the whole composite phrase ...
>
> [33] In some of the cases referred to above, the nature of the nexus between the property in question and the commission of the crime has been the primary focus of attention. In others, the nature of the criminal activity and its relationship to the subject property has been the primary focus. This has come about because of the particular facts in each of the different cases. However, the over-arching principle that in my opinion can be extracted from the cases in relation to that part of the statutory definition of tainted property presently under consideration is that some activity connected with the relevant crime must have involved the utilisation or employment of the property with the aim or purpose of committing or furthering the commission of the crime in question.

[37] In *National Director of Public Prosecutions v Kalmar Industries SA (Pty) Ltd* [2017] ZASCA 142 the Supreme Court of Appeal of South Africa held the view that in giving meaning to the term, 'instrumentality of an offence', the focus is not on the wrongdoer, but on the role the property plays in the commission of the crime:

> [22] This court has held that in giving meaning to the term, 'instrumentality of an offence', the focus is not on the wrongdoer, but on the role the property plays in the commission of the crime. The question is whether a functional relation between property and crime has been established. The property must play a part, in a reasonably direct sense, in those acts which constitute the actual commission of the crime in question. The word 'instrumentality' itself suggests that the property must be instrumental in and not merely incidental to the commission of the offence.
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> [23] In *Cook Properties,* Mpati DP and Cameron JA said that the words 'concerned in the commission of an offence', must 'be interpreted so that the link between the crime committed and the property is reasonably direct, and that the employment of the property must be functional to the commission of the crime ... In a real or substantial sense the property must facilitate or make possible the commission of the offence.

[38] In *Mohunram and another v National Director of Public Prosecutions and another* [2007] ZACC 4, the Constitutional Court of South Africa deliberated on the meaning and scope of instrumentality of an offence and held that:

> [44] In considering the meaning of the phrase 'an instrumentality of an offence referred to in Schedule 1' (s 1 of POCA defines an 'instrumentality of an offence' as 'any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere'; see also ss 38(2)(a) and 50(1)(a) of POCA), this court adopted the interpretation accepted by the Supreme Court of Appeal in a trilogy of cases (*National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd 2004 (8) BCLR 844* at para 6-32; *Prophet v National Director of Public Prosecutions* 2006 (1) SA 38 at paras 10-17; *National Director of Public Prosecutions v Parker* 2006 (3) SA 198). In the first of those cases, *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd* 2004 (8) BCLR 844 at para 12, Mpati DP and Cameron JA (Scott, Nugent and Lewis JJA concurring) said that:
>
> > [i]t is clear that in adopting this definition the Legislature sought to give the phrase a very wide meaning'. They held, however, that in order to ensure that application of the forfeiture provision does not constitute arbitrary deprivation of property in violation of s 25(1) of the constitution (at para 31):
> >
> > ... the words 'concerned in the commission of an offence' must ... be interpreted so that the link between the crime committed and the property is reasonably direct, and that the employment of the property must be functional to the commission of the crime. By this we mean that the property must play a reasonably direct role in the commission of the offence. In a real or substantial sense the property must facilitate or make possible the commission of the offence. As the term 'instrumentality' itself suggests ... the property must be

> instrumental in, and not merely incidental to, the commission of the offence. For otherwise there is no rational connection between the deprivation of property and the objective of the Act: the deprivation will constitute merely an additional penalty in relation to the crime, but without the constitutional safeguards that are a prerequisite for the imposition of criminal penalties.

In other words, the determining question is (at para 32):

> ... whether there is a sufficiently close link between the property and its criminal use, and whether the property has a close enough relationship to the actual commission of the offence to render it an instrumentality.

...

[45] ... As held by Stegmann J in *National Director of Public Prosecutions: re application for Forfeiture of Property in terms of* ss 48 and 53 of the Prevention of organised Crime Act 1998 (WLD) Case no 2000/12886, 7 July 2000, unreported, at para 12:

> The mere fact that a particular offence was committed on a particular property would not necessarily entail the consequence that the property was 'concerned in the commission' of the offence, or that the property had become an 'instrumentality of an offence'. It seems to me that evidence of some closer connection than mere presence on the property would ordinarily be required in order to establish that the property had been 'concerned in the commission' of the offence.' (Stegmann J at fn 10 went on to point out that: 'In particular, an 'instrumentality of an offence' is only liable to forfeiture in terms of section 50(1)(a) of the Prevention Act, 1998 when the offence is one referred to in Schedule 1 ... Every [scheduled] offence must be committed on some piece of property. But it would be absurd to infer that the Legislature had intended every property on which such an offence had been committed to be liable to forfeiture to the State. A closer connection must be shown than mere presence. It must be established that the property was 'concerned' in the commission of the offence, and not merely that the offence was committed on the property ...

[49] It follows that the use, or allowing the use, of the property was a necessary part of the offences the applicants committed. It was not possible to commit the offences without using the property. In the language of *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd* 2004 (8) BCLR 844 at para 34, the property was 'employed ... to make possible or facilitate the commission of the offence'. Thus, the causal connection between the property and the offences was certainly a direct one. The offences themselves pivoted on the use of the property for gambling purposes. It is common cause that neither applicant had the requisite licence. That was, however, not the essence of their crimes. The essence was that the applicants used the property or allowed it to be used as an illegal casino. The property was thus integral to the commission of the relevant offences.

[39] Employing those factors of consideration, whilst a doubt can be raised for example, whether a bag containing counterfeit monies can be regarded as an

instrument since it was used merely to contain the money, a car that is used in the transportation of that bag and monies to a buyer can be considered to be instrumental in the commissioning of an offence. To illustrate further, in *Director of Public Prosecutions (NSW) v King* the court held that the boat on which an offence of sexual assault took place could not be said to have been used or in connection with the commission of the offence as the boat was just a place where the offence happened. In *Mohunram & Another v National Director of Prosecutions and another*, the court held that the property that was used for the operation of an illegal casino was an instrument of an offence since the act of illegal gambling could not have taken place without the use of the property. In *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd* [2004] ZASCA 36 SCA, the Supreme Court of Appeal of the Republic of South Africa held that the frequency of drug deals at a hotel did not make it an instrument of offence as the hotel was in the business of renting rooms to the public and that property had a public character.

[40] By contrast, the same court in *National Director of Public Prosecutions v Parker* [2005] ZASCA 124 held that a private property owned by the respondent was an instrument of the offence having regard, inter alia, to the accessibility of drug sellers to the property and the frequency of entrapment operations by the police on that property. In that case the respondent claimed that she was an innocent owner who have not been aware of all that was happening on the property and therefore the property could not have been an instrumentality of an offence. In finding for the prosecution the court had dismissed the claimant's claim of innocence after considering a host of factors and looking at 'the whole picture':

> [17] The situation in *Cook Properties* appears to me to be distinguishable from the situation in this case. There, firstly, the hotel was in business to rent out rooms to the public. It accordingly had a public character and a public space which was not easy for the owner or its employees to control. Secondly, the dealers were tenants who came and went. Thirdly, the hotel was in an area notorious for drug dealing. In this case, we are dealing with a private dwelling which is not in a similarly notorious area. Unlike the hotel scenario, a house owner can reasonably be expected, alone or through family members, to act vigilantly and exercise control in relation to the property to prevent crime there or at least to have an interest in knowing if crime is being committed there. Despite the arrests referred to, dealing in drugs nevertheless continued unabated. True, there was a variety of different sellers but it is inherently more likely that they were agents for somebody resident on the property rather than that as dealers themselves they went to this house to sell their wares when they could do so in the street or elsewhere. Even in the latter event it is more likely than not that the respondent's son would, as her representative in managing the property, have been aware that the sellers were using the property as their market and permitted them to do so.
>
> [18] The NDPP, in terms of s 50(1) of the Act, bears the onus, on a balance of probabilities, to establish that the property was an instrumentality of an offence. In

order to sustain a forfeiture order the court must, in my view, look at the whole picture and determine whether the property, in the totality of the circumstances of the case, was a substantial and meaningful instrumentality in the commission of the offence.

[19] The court a quo, in arriving at the conclusion that the property was merely the incidental venue from which drugs were obtainable, does not appear to have looked at the whole picture. It made a comparison, as/have said, between the facts in this case and postulated the situation where drugs are sold regularly by drug dealers in an alley in a city. In my view the two situations are, with respect, not analogous. The alley is clearly just a venue for drug deals. The evidence here goes further than establishing that the property was merely a venue.

[20] A scrutiny of all the evidence, reveals the following features which must be added to what/have said already: (a) the property was a place where buyers could find drugs for sale; (b) most of the deals were executed on the same portion of the property, namely, the covered driveway where customers with privacy and relative safety conducted their business; (c) the frequency of the entrapment operations over a protracted period clearly shows that drug dealing on the property occurred regularly; (d) it is possible that the trapping incidents were not the only times during which drugs were sold there; (e) a variety of drugs (mandrax tablets, crack cocaine crystals, ecstasy tablets and dagga 'stoppe'), was available; (f) one of the successful entrapment operations established that the seller entered the main house and returned with ecstasy tablets and crack cocaine crystals. Two reasonable possibilities may be inferred: first, that the ecstasy and cocaine might have been procured from someone else within the house, second, that they might have been stored in the house. However the latter inference seems more plausible when regard is had to the telling words used by the seller concerned that they were 'out of stock'; and (g) the adjoining plot and the motor vehicle wreck provided very near yet safely distant storage for some of the drug supply.

[21] As I have indicated earlier, the respondent did not deny any of the specific facts regarding the sales of drugs and the storage of some on the property as well as the fact that a portion of the property was adapted for customer convenience. Although it is not odd to have that kind of adaptation on a residential property, it is, on the totality of the facts in this case, probable that the property was adapted to facilitate the illegal activities on it particularly when regard is had to the failure by the respondent to refute the essential facts.

[22] The respondent's professed lack of knowledge has no bearing on the determination of the issue relating to the first inquiry. Such protestations, in so far as they relate to the first stage inquiry, do not, in any event, establish any material dispute of fact. In my view, on all the evidence, the NDPP has established on a balance of probability that the property was not an incidental venue from which drugs were obtainable, but was in fact a drug shop and therefore substantially instrumental in the commission of the illegal activities.

[41] As can be seen in the case of *National Director of Public Prosecutions v Parker* an issue may arise regarding the lack of knowledge or consent of the owner of the 'thing' or 'property' that was used as an instrumentality of an offence. In those circumstances, the court must weigh all facts and

circumstances of the case to determine whether the claim to innocence is, on the balance of probabilities, tenable and believable. Section 61 of the AMLFTA provides the framework on how a judge should consider such issues. Section 61(3) stipulates that the judge may infer from the objective circumstances of the case if there is lack of good faith in the claim and conversely, if that claim is bona fide. Section 61(4)(c) and (e) specifically provides that if the judge is satisfied that the claimant lacked knowledge and was not intentionally ignorant of the illegal use of the property or if he had knowledge he did not freely consent to its illegal use or the claimant did all reasonably possible to prevent the illegal use of the property, the forfeiture should be refused. The burden of proof to be discharged by the claimant is on the balance of probabilities (see s 70(1) of the AMLFTA). Thus, s 61(4)(c) provides the avenue for example, to an owner of a house who rented his property to a party who used the property to plan a terrorist attack or the owner of an internet cafe who unknown to him accommodated a user to pay for the use of computer to transmit data related to acts of terrorism, to challenge an application for forfeiture.

[42] Following the deliberations and decisions in the above referred cases, this court is persuaded to agree and holds the view that there must be a substantial link, not merely coincidental or incidental, between the 'thing' or the 'property', whether in whole or in part, used in or in connection with the commissioning of the unlawful activity. The substantiality is determined by examining the facts and circumstances of each case. In each case the following general factors ought to be taken into consideration:

(a) the nature of the thing or property;

(b) its proximity or link in the commission of the unlawful activity;

(c) whether the thing or property has a private or public character; and

(d) whether the offence could have been committed without the use or utilisation of that thing or property.

[43] Therefore, it would be a judge's duty to consider all facts and circumstances of a case and find, on the balance of probabilities and guided by the factors enumerated above, whether the thing or property in question is an instrument of offence under s 56(1)(d). If the judge finds that on the balance of probabilities the thing or property in question is not an instrument or instrumentality in the commission of the unlawful activity due to any of or the combination of the factors mentioned stated above then no order for forfeiture should be granted against that thing or property. In any case, the question whether the crime could have been committed or completed without the use of the thing or property must be at the core of any enquiry into the question of instrumentality.

[44] Finally, it would be imperative to state that notwithstanding AMLFTA is silent on the consideration of proportionality of forfeiture measured against the offence committed, in this court's considered view the consideration of that matter is ancillary to the judge's duty under s 56(1)(d) following the determination of instrumentality of an offence. This court's view is founded on the discussion on the principle of proportionality in a forfeiture by the Constitutional Court in *Mohunram and another v National Director of Public Prosecutions and another* where although the court found that the property was instrumental in the commission of the offence of running an illegal casino, yet it held the view that the forfeiture of the entire property was not proportionate to the offence committed based on considerations, inter alia, that the respondent had paid a fine for the offence, only part of the property was used for the casino notwithstanding the respondent had permitted the use of that part of the property for that purpose and that the nature of the crime was not closely connected to serve the objective of the SAPOCA. Reproduced below are excerpts of parts of Van Heerden AJ's deliberations on the principle of proportionality in delivering the majority decision of the Constitutional Court:

> [120] Civil asset forfeiture constitutes a serious incursion into well-entrenched civil protections particularly those against arbitrary and excessive punishment and against arbitrary confiscation of property. Courts in this country (*National Director of Public Prosecutions v Van Staden* 2007 (1) SACR 338 at paras 7–8; *Prophet v National Director of Public Prosecutions* 2007 (2) BCLR 140 at paras 46 and 61; *National Director of Public Prosecutions v Mohamed* No 2002 (4) SA 843 at para 22; *Mohamed NO v National Director of Public Prosecutions* 2002 (2) SACR 93 at para 21) and elsewhere have generally been astute to the fact that forfeiture of the instrumentalities of crime can produce arbitrary and unjust consequences. (*Martineau v Minister of National Revenue* [2004] 3 RCS 737; *US v Hosep Krikor Bajakajian* (1998) 524 US 321; *CaleroToledo v Pearson Yacht Leasing Co* (1974) 416 US 663.
>
> [121] ... Textually, once the instrumentality threshold has been met, courts must authorise forfeiture. However, courts have consistently interpreted 'shall' to mean 'may'. They have correctly held all requests by state prosecutors for civil forfeiture to the standard of proportionality which amounts to no more than that the forfeiture should not constitute arbitrary deprivation of property or the kind of punishment not permitted by s 12(1)(e) of the constitution. (See *National Director of Public Prosecutions v RO Cook Properties (Ply) Ltd* 2004 (8) BCLR 844, *National Director of Public Prosecutions v Van Staden* 2007 (1) SACR 338 and Prophet.)
>
> ...
>
> [124] It seems to me that if the forfeiture sought occurs within the context of POCA, additional and countervailing considerations come into the proportionality analysis. The nature of the crime must be probed keeping in mind the predominant purpose of POCA. This is a self-evident proposition. The forfeiture must advance the purpose that POCA proclaims. Otherwise, the forfeiture, being the means, will be misaligned with the predominant ends pursued by POCA.

A ...

[126] In my view, it must follow that, in deciding whether or not forfeiture of property would be proportionate, the question whether the instrumentality of the offence is sufficiently connected to the main purpose of POCA must be considered. I join Sachs J in emphasising that the more remote the offence in issue is to the B primary purpose of POCA, the more likely it is that forfeiture of the instrumentality of the crime is disproportionate. In other words, when ordinary crime is in issue, the sharp question should be asked whether it is a crime that renders conventional criminal penalties inadequate. Is it a crime that requires extraordinary measures for its detection, prosecution and prevention? Is it a crime that warrants the extraordinary measures akin to those appropriate to organised crime as envisaged in C POCA? Is it a crime that has some rational link, however tenuous, with racketeering, money laundering and criminal gang activities? If the answers to these questions were in the negative, this would be an important indication that forfeiture may be disproportionate.

D ...

[130] ... I have intimated earlier that proportionality is not a statutory requirement but an equitable requirement that has been developed by the courts to curb excesses of civil forfeiture. Put otherwise, the requirement of proportionality is a constitutional imperative. It is imposed not by the relevant statute but by constitutional disdain for arbitrary dispossession of property and unwarranted or E excessive punishment. It would be entirely inappropriate to lumber a person facing forfeiture proceedings under s 48 of POCA with the burden to plead the defence of proportionality. In my view, the NDPP itself, when initiating proceedings under s 48, should place before the court adequate facts that will allow the court to adjudicate properly on an application for forfeiture under s 50(1), and in particular, F on whether the forfeiture sought is constitutionally proportionate.

[45] To demonstrate further the relevance and necessity for the consideration of proportionality in a forfeiture, reference is also made to the English Court of Appeal decision in *R v Shabir* [2008] EWCA Crim G 1809; [2009] 1 Cr App Rep (S) 497; [2008] All ER (D) 414 (Jul). In that case the Court of Appeal held that the amount of monies sought to be for confiscated (being the term used under UKPOCA) by the prosecution which was far in excess of the actual value of benefit derived by the defendant from the inflation of claims made to the Health Service for the cost of prescriptions H dispensed, amounted to an oppression and disproportionate to the value of the actual benefit derived by the defendant. Although the confiscation action there followed a conviction for the offence of theft and reliant on the provisions relating to criminal lifestyle under UKPOCA, it bears relevant to note that the Court of Appeal expressed the view that since a court has the power to I determine whether a confiscation should be ordered, then the court also has the power to determine whether a confiscation should be refused on the grounds that it was an abuse of the court's process and oppressive against the defendant having regard to the benefit derived from the crime. In delivering the decision of the court, Hughes LJ stated:

[22] ... Accordingly there is an individual decision to be made by the Crown in each case whether to ask the court to apply the confiscation process and on what basis to put the claim if made. Similarly, it is open to the Crown, subject to the approval of the Judge, to discontinue the confiscation proceedings at any stage or to compromise them. Thus, it is accepted by the Crown, there is an individual exercise of judgment involved in each case.

[23] The court retains the jurisdiction to stay an application for confiscation, as any other criminal process, where it amounts to an abuse of the court's process. In the present context, that power exists where it would be oppressive to seek confiscation, or to do so on a particular basis ...

[24] This jurisdiction must be exercised with considerable caution, indeed sparingly. It must be confined to cases of true oppression. In particular, it cannot be exercised simply on the grounds that the Judge disagrees with the decision of the Crown to pursue confiscation, or with the way it puts its case on that topic. A specific example of that principle is that it is clearly *not* sufficient to establish oppression, and thus abuse of process, that the effect of confiscation will be to extract from a Defendant a sum greater than his net profit from his crime(s). That is inherent in the statutory scheme ...

[25] Article 1 of the First Protocol to the European Convention on Human Rights provides as follows:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes of other contributions or penalties.

This country's confiscation regime has consistently been held to be a proportionate and legitimate response to crime and thus to occasion no infringement of the Protocol: see for example *Phillips v United Kingdom* (2001) 11 BHRC 280 and *R v Rezvi* [2002] UKHL 1; [2003] 1 AC 1099; [2002] 1 All ER 801. Even if it be accepted that the Protocol may be capable of being infringed by a truly oppressive and thus disproportionate individual order for confiscation (as to which we express no opinion), it is clear that the court's power to stay for oppression provides the remedy.

...

[27] The enormous disparity between the excess of Shabir's inflated claims (some few hundreds of pounds) and the confiscation order of over £212,000 raises the real likelihood that this order is oppressive. As it seems to us, however, such a disparity will not in every case by itself establish oppression. If it is a case in which the criminal lifestyle provisions of the Act can legitimately be applied, and with them the several s 10 assumptions as to the source of assets, it may well be perfectly proper for a confiscation order to be massively greater than the gain from the offences of which the Defendant has been convicted. That is the whole purpose of the criminal

lifestyle provisions. They extend the reach of confiscation beyond the particular offences of which the Defendant has been convicted.

...

[29] What was patently oppressive in the present case was to rely on the form of the counts for obtaining a money transfer by deception (i) to bring the criminal lifestyle provisions into operation when they could not have applied if the charges had reflected the fact that the Defendant's crimes involved fraud to an extent very much less than the threshold of £5000, and (ii) to advance the contention that the Defendant had benefited to the tune of over £179,000 when in any ordinary language his claims were dishonestly inflated by only a few hundred pounds. We accept that those who determined to seek confiscation on the basis advanced did so in good faith, having not applied their minds to the question whether what was being done was oppressive. But we have no doubt that in fact it was.

[46] Notwithstanding that the decision in *R v Shabir* is premised on the evaluation of the benefit derived by the defendant under the scheme of UKPOCA and not the instrumentalities of an offence, in this court's opinion the consideration of proportionality there equally applies to the forfeiture of instrumentalities of an offence. Guidance is also taken from another decision of the English Court of Appeal in *R v Nelson; R v Pathak; R v Paulet* [2010] 4 All ER 666; [2009] EWCA Crim 1573; [2010] QB 678, which was decided not too long after *R v Shabir* where it was held that whilst an argument for abuse of process cannot be founded on the basis that the application of the law will result in an oppressive result, it did not preclude the court from considering whether oppression was present. Speaking for the Court of Appeal, Lord Judge CJ stated the following:

[34] One of the problems illustrated in these cases and in a number of other cases to which our attention was drawn, is that Crown Courts up and down the country are concerned about the possible consequences of the draconian legislation provided by the developing confiscation regime set out in the Criminal Justice Act 1988 as amended, the Drug Trafficking Act 1994, and the Proceeds of Crime Act 2002. Indeed we detect that orders staying confiscation proceedings are perhaps too readily being made in Crown Courts.

[35] Abuses of the confiscation process may occur and, when they do, the appropriate remedy will normally be a stay of proceedings. However an abuse of process argument cannot be founded on the basis that the consequences of the proper application of the legislative structure may produce an 'oppressive' result with which the judge may be unhappy. Although the court may, of its own initiative, invoke the confiscation process, the responsibility for deciding whether properly to seek a confiscation order is effectively vested in the Crown. When it does so, the court lacks any corresponding discretion to interfere with that decision if it has been made in accordance with the statute. The just result of these proceedings is the result produced by the proper application of the statutory provisions as interpreted in the House of Lords and in this court. However to conclude that

proceedings properly taken in accordance with statutory provisions constitute an abuse of process is tantamount to asserting a power in the court to dispense with the statute.

[36] As a matter of principle, that is impermissible, and this court has said so. Thus in *R v Shabir* [2008] EWCA Crim 1809; [2009] 1 Cr App Rep (S) 497; [2008] All ER (D) 414 (Jul) it was observed:

> This jurisdiction must be exercised with considerable caution, indeed sparingly. It must be confined to cases of true oppression. In particular, it cannot be exercised simply on the grounds that the judge disagrees with the decision of the Crown to pursue confiscation, or with the way it puts its case on that topic.

We repeat what was said in this court at an earlier hearing involving Paulet:

> The abuse of process jurisdiction is one which needs to be exercised with great circumspection. The jurisdiction cannot be converted on a case by case basis into a structure which involves, on proper analysis, something like wholesale undermining of the statutory provisions. It is not easy to conclude that it is an abuse of process for those responsible for enforcing legislation to see that it is indeed properly enforced.

[37] As the proliferation of decisions in this court, and indeed in the House of Lords demonstrates, the statutory framework which governs the making of confiscation orders is far from straightforward. However, taking it very briefly indeed, the principle is that the court is under a duty to deprive a convicted Defendant of the 'benefits' of his crimes ...

[46] ...We should add that in his judgment the recorder referred to an observation in the opinion of the House of Lords in *R v May* [2008] UKHL 28; [2008] 1 AC 1028; [2008] 4 All ER 97 where Lord Bingham pointed out that the legislation did not operate 'by way of fine'. To appreciate the true impact of that observation, however, it is essential to refer to the opinion of the House of Lords in *Jennings v CPS* [2008] UKHL 29; [2008] 1 AC 1046; [2008] 4 All ER 113. It was pointed out:

> There is a real danger in judicial exegesis of an expression with a plain English meaning, since the exegesis may be substituted for the language of the legislation. It is, however, relevant to remember that the object of the legislation is to deprive the Defendant of the product of his crime or its equivalent, not to operate by way of fine. The rationale of the confiscation regime is that the Defendant is deprived of what he has gained or its equivalent. He cannot, and should not, be deprived of what he has never obtained or its equivalent, because that is a fine. This must ordinarily mean that he has obtained property so as to own it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else.

Within the present context, the confiscation order did not amount to a fine.

[47] Finally we remind ourselves that in *R v Shabir* the court explained that it was inherent in the statutory scheme and clearly not 'sufficient to establish oppression ... that the effect of confiscation will be to extract from a Defendant a sum greater than his net profit from his crime(s)' (see also *Morgan and Bygrave* [2008] EWCA Crim

A 1323; [2008] 4 All ER 890; [2009] 1 Cr App Rep (S) 333) ...

[48] These proceedings were not an abuse of process ...

[47] Thus, applying the approach and evaluation in *Mohunram and another v National Director of Public Prosecutions and another*, *R v Shabir* and *R v Nelson; R v Pathak; R v Paulet*, it must be said that whilst a forfeiture under AMLFTA may seemingly produce oppressive results, the same cannot necessarily be held to be an abuse of process of court and oppressive if the forfeiture satisfies the objective and conditions for forfeiture as set out under the law. That position notwithstanding, this court holds the firm view that a judge hearing an application for forfeiture under s 56(1)(d) of the AMLFTA should not preclude himself from judicially evaluating facts and circumstances that may prove, on the balance of probabilities, the presence of abuse of process of court, oppression and disproportionality keeping in mind the constitutional guarantee of the right to property under art 13 of The Federal Constitution. That concludes the general background discussion on the laws on instrumentalities of an offence.

Section 3 of the AMLFTA — A matter of 'thing' and 'property'

[48] The deliberations will now move on to the subject matters that constitute the instrumentality of an offence under s 3 of the AMLFTA. The definition of 'instrumentalities' is made up of two parts, one refers to 'any thing' and the second, refers to 'property'.

What is a 'thing'?

[49] Section 3 defines 'thing' as 'includes material', 'material' is then defined as including 'any book, document or other record in any form and any container or article relating to if'. Looking elsewhere for assistance, the plain and ordinary meaning of a 'thing' as a noun refers to an object (see https://dictionary.cambridge.org/dictionary/english/thing). 'Material' is defined as a physical substance that things can be made of used or can also mean when writing something such as a book, or information produced in various forms to help people or to advertise products (see https://dictionary.cambridge.org/dictionary/english/material). Material can also mean cloth or fabric and as an adjective 'material' can denote physical objects rather than the mind or spirit (see https://www.lexico.com/definition/material).

[50] Thus in this court's view 'any thing' means any physical object other than 'property' and can include any material making up that thing. Such a thing could be any object such mode of transport, machinery, an electrical appliance, a computer, a communication device, tools or appliances, access

instruments such as keys or access card, credit or debit card, physical books, just to name a few. The words 'other record in any form' suggests that electronic records kept in folders or files in a computer can also be a thing. The scope of what a 'thing' may include is therefore wide. Whatever that thing may be, if it is proven that it has been substantially and directly used in the commission of an offence without which the crime could not be carried out, it then becomes an instrumentality of an offence.

What is a 'property'?

[51] Dealing next with the second part of the definition, it provides that 'instrumentalities' includes 'any property which is wholly or partly used in, or in connection with, the commission of any unlawful activity'. Section 3 defines 'property' as:

> (a) assets of every kind, whether corporeal or incorporeal, moveable or immovable, tangible or intangible, however acquired; or
>
> (b) legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including currency, bank credits, deposits and other financial resources, traveller's cheques, bank cheques, money orders, capital market products, drafts and letters of credit,
>
> whether situated within or outside Malaysia, and includes a legal or equitable interest, whether full or partial, in any such property.

[52] The definition under s 3 adopted with additions the general definition of 'property' provided under article 2 of the UNCAC:

> 'Property' shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets.

What are 'assets'?

[53] Dealing first with the term 'assets', that term is not defined under AMLFTA. It is generally accepted however, that an asset is a resource owned by an individual or an entity that will provide a future benefit including that can be converted into cash and be used to pay debts (see https://www.investopedia.com/terms/a/asset.asp; https://dictionary.cambridge. org/dictionary/english/asset). Assets can be classified into current assets, fixed assets, financial assets and intangible assets. *Black's Law Dictionary* (11th Ed) defines asset as something that is owned and has value. It includes everything which can be made available for payment of debts. *Jowitt's Dictionary of English Law* (5th Ed) defines assets as property available for satisfaction of debts.

[54] In *Re Khoo Kim Hock* [1974] 2 MLJ 29; [1974] 1 LNS 134, Mohamed Azmi J (as he then was) held that for the purposes of s 2 of the Bankruptcy Act 1967 property is an asset which is used for the payment of debt. The case of *In the matter of Lau Hieng Yee, a bankrupt* [2000] 1 MLJ 59; [1999] 4 CLJ 582 applied the same meaning to an asset.

[55] Thus, in this court's view an 'asset' in the definition on 'property' under s 3 of the AMLFTA should mean and refer to any thing that has value whether presently or some point in future and can be converted into cash.

What is the nature of a bank account?

[56] Learned deputy public prosecutor submitted that a bank account is 'property' as defined under s 3 of the AMLFTA. In particular it was submitted that a bank account falls within the meaning of 'deposits and other financial resources' under the limb (b) of that definition.

[57] In determining whether a bank account falls within limb (a) or (b) to the definition of 'instrumentalities', it would be necessary to firstly understand the nature of a bank account. Whilst s 3 defines 'accounts' as including 'records of any financial transactions conducted by any reporting institution listed in the First Schedule', it does not define 'bank account' or 'account'.

[58] Turning to the Financial Services Act 2013, whilst it defines 'banking business' to include 'the business of accepting deposits on current account, deposit account, savings account or other similar account', it does not however, define what a bank account is.

[59] Now, it is established law on banking in Malaysia that the relationship between a bank and its customer is a contractual one. The essence of the relationship is that a bank is entitled to use the money of the customer in a deposit account such as a current or savings account for its own purposes and its undertaking to repay an equal amount to that paid in, with or without interest, either at call or at a fixed time (see *Standard Chartered Bank v Tiong Ngit Ting (f)* [1998] 5 MLJ 220 ; [1997] 5 CLJ 552, *Bekalan Sains P&C Sdn Bhd v Bank Bumiputra Malaysia Bhd* [2011] 5 MLJ 1; [2011] 1 LNS 232). When a person or entity opens a bank account that person or entity becomes a customer of the bank (see *Law of Banker and Customer* (5th Ed) by Poh Chu Chai at p 26). In deposit accounts such as current accounts the relationship is described as one of debtor and creditor. Where the monies stand in credit the customer is the creditor to the bank and the bank is the debtor (*Folley v Hill* (1848) 2 HLC 28). The banker-customer relationship may be terminated either by way of: (a) mutual agreement of the parties; (b) by unilateral act of a party, as example where the customer or the bank closes the

current or saving account; or (c) by operation of law, as example upon death or bankruptcy.

[60] What actually happens when a customer opens an account with a bank, does the customer acquire the account or applies for it? It must be the latter. It is a facility offered by a bank to the applicant (at that relevant stage) after acceptance of an application and confirmation of the basic identification details. The bank has the right and even an obligation under law to not offer the facility if there are doubts in the identity or integrity of the applicant. Section 16 of the AMLFTA imposes the obligation on a bank to undertake a customer due diligence before opening an account and where the name of the customer is fictitious, false or incorrect, the bank cannot open or operate such an account. Those obligations are equally mirrored in s 18 of the AMLFTA where the applicant shall not open an account or conduct a business relationship with a bank under a fictitious, false or incorrect name. After all the preliminaries are cleared, the applicant then opens an account and he then becomes a customer after a minimal amount of cash is deposited into that account. When an account is opened the applicant becomes a customer and the bank takes a mandate from the customer. In its simplest form, the mandate is the customer's specimen signature and personal or business entity details (see *Banking Law* (5th Ed) Lee Mei Pheng, Detta Samen, Ivan Jeron Detta, p 263). The bank then acts in accordance with the mandate along the lines of the rights and obligations of the customer and the bank. Generally, the customer's rights in relation to deposit accounts are: (a) right to payment; (b) right to draw cheques; and (c) right to interest whilst the customer's obligations are: (a) duty to take reasonable care in drawing cheques; and (b) duty to disclose forgeries once he is aware of it. On the other end of the relationship the bank has the right to: (a) commission or service charge; (b) interest; and (c) set off, whilst the banker's obligations are to generally to observe duty of care in carrying the customer's mandates and to comply with statutory obligations on conduct of banking business (see ss 123 and 124 of the Financial Services Act 2013) (see *Banking Law* at pp 196–199 and 228–229).

[61] In operating the account the customer has no absolute right and freedom to conduct his account in any way or fashion he pleases. He is subjected to certain duties under contract and under statutory law. More importantly, the account that he operates is a mere facility accorded by the bank in conjunction with the relationship the bank has agreed to have with him. To put it simply, in exchange for the prospect of receiving funds from the customer in deposit accounts over which the bank has the right to use, upon accepting the cash the bank provides the customer with a virtual storage facility wherein he deposits all his funds and from which facility he makes out payments. That facility is identified through the bank account number registered under his name and all deposits and payments are verifiable via

periodic statement of accounts issued by the bank, whether in physical or digital form. The fact that the account is just a facility is reflected in the right of the bank to stop the operation of the account in circumstances of: (a) death or mental incapacity of a customer; (b) bankruptcy or winding up of customer; (c) garnishment of monies by a third party; and (d) assignment of the credit balance in the account to a third party (see *Banking Law* at p 264).

[62] Thus, whilst an account holder can be said to be the owner of all monies standing in credit in his account and those monies forms part of his personal or business assets, yet a distinction must be drawn between the cash and the facility that receives and holds the cash. The facility in real terms actually belongs to the bank as part of its banking business and the facility is not a banking instrument of value. Drawing an analogy, the bank is the owner of all compartments for rent in a storage facility warehouse whilst the customer is the tenant for a compartment in which he stores his personal belongings. The customer does not own the compartment merely because of the rent he pays. If he defaults in paying his rent, the rental is terminated, his personal belongings can be removed or even sold off to settle the outstanding rents.

[63] Interestingly, the fact that a bank account is merely a facility is actually recognised by the APOCA where at s 338 'account' is defined as '… any facility or arrangement through which financial institutions accepts deposits or allows withdrawals …'.

[64] In this court's view AMLFTA does recognise, through s 50, that a bank account is a facility although not expressly. Section 50 touches on 'seizure of moveable property or any accretion to it in a financial institution'. Although not defined under s 50, accretion refers to a gradual and incremental growth of assets (see https://www.investopedia.com/terms/a/accretion.asp). Thus, in relation to a bank account accretion would refer to the gradual increase in the cash standing in credit in a deposit account or the value of a fixed term deposit account due to the accumulation of interest over the principal amount. Therefore, under s 50 both the principal and accretion are seizable. Neither s 3 nor s 50 of define 'moveable property'. Looking elsewhere, whilst s 22 of the Penal Code defines 'moveable property' as 'corporeal property of every description …', s 3 of the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989) ('Interpretation Act') defines 'moveable property' as 'all property other than immoveable property'. Looking at the context of the application of the word 'moveable property' under s 50 and in absence of any specific definition in AMLFTA, the definition under the Interpretation Act should be the preferred definition as it is general enough to include incorporeal or intangible property such as a chose in action which includes monies in a bank account (see p 441 of *Criminal Law in Malaysia and Singapore* (3rd Ed) by Stanley Ho and the case of *Che Man bin Che Mud v Public Prosecutor* [1994]

MLJU 354; [1994] 4 CLJ 823.

[65] Therefore, since s 50 speaks of seizure in terms of moveable property and its accretion, the reference to 'moveable property' must have not been intended to mean a bank account but only to monies standing in credit in that account. It would have been very easy and convenient for the legislators to define 'account' under AMLFTA as how the APOCA did, but that was not done. For that reason, in this court's view, bank accounts were never intended to be subject of a seizure and later for forfeiture because the legislators must have recognised that a bank account is not property in any legal sense that can be seized or forfeited. It is merely a storage facility where no possession attaches, let alone ownership. The idea of ownership of a bank account is therefore not real as the account is just a facility that is in effect owned and provided by the bank and accommodated for use to the customer. Therefore to say that someone owns a bank account and monies in it is in essence just stating that the person has the contractual right to operate a facility known as a deposit account accorded by the bank at its discretion identified via a given account number registered under his name and in which account cash is deposited and in credit.

[66] For the sake of further discussion, this court observes that since s 50 does not provide for the seizure of the bank account but only monies therein and the accretion, then this court does not see how s 56(1)(d) can be used to justify the forfeiture of something beyond which was envisaged under s 50. Although the power and scope of the court to order a forfeiture under s 56(1) is not determined by the terms of a prior order for seizure, in this court's view, as far as it relates to a bank account, the court should be guided by the provision of s 50. Thus, since s 50 does not foresee the seizure of a bank account and does not expressly provide for it, it should not be the function of this court to expand the scope of that section by holding that a forfeiture under s 56(1)(d) can also include a bank account.

[67] Continuing on, it is also a feature of an 'asset' under s 3 that the asset was 'acquired'. Referring to *Black*'s, the word 'acquire' means 'to gain possession of, to get or obtain', whilst Cambridge Dictionary defines the word to mean 'to get or buy something' (see https://dictionary.cambridge.org/dictionary/english/acquire).

Thus, based on the above discussions on the character of a bank account, this court holds the view that a bank account cannot also be an asset under that definition because it is a facility granted upon an *application made* and accorded to the customer at the discretion of the bank and *not something that* was *acquired* from the bank. Even if the word 'acquired' is to be taken loosely to mean obtained or gotten, that aspect alone when examined with other aspects of the meaning of 'assets' as discussed earlier would not be enough to qualify a bank account as an asset.

Is a bank account a 'thing' or an 'asset' under s 3 of the AMLFTA?

[68] In answering that question, this court holds in conclusion that a bank account is not a 'thing' nor an 'asset' under s 3. A bank account is not an object and a distinction must be made between a bank account and monies standing credit in such account. Whilst monies standing in credit in a bank account are assets, by contrast a bank account is but a mere facility that is applied for and accorded to the customer at the discretion of the bank. It is not acquired by the customer to the exclusion of any right of the bank over the same. It being a mere facility it does not belong to the customer whether in terms of possession or ownership. A bank account has no value in itself that can be converted into cash.

Is a bank account 'deposits and other financial resources'?

[69] Limb (b) to the definition of 'property' is circumscribed by the express reference to the words: (a) 'legal documents or instruments in any form ...'; (b) 'evidencing title to or interest in'; (c) 'such assets' and (d) 'including currency, bank credits, deposits and other financial resources, traveller's cheques, bank cheques, money orders, capital market products, drafts and letters of credit ...'.

[70] Touching first on the term 'such assets', in this court's view the use of the word 'such' before 'assets' must refer to assets that had been previously mentioned in an earlier provision. Since the word 'assets' had appeared earlier and once only in limb (a) then the word 'assets' in limb (b) must mean the same assets stated in limb (a). Only then would the word 'such' would serve any purpose. Therefore, the 'legal documents or instruments in any form evidencing title to or interest in' must refer to legal documents or instruments evidencing title to the assets in limb (a). The next point is, to which matter do the examples 'including currency, bank credits, deposits and other financial resources, traveller's cheques, bank cheques, money orders, capital market products, drafts and letters of credit ...' refer to, do they refer to the legal documents or instruments OR do they refer to the assets?

[71] After undertaking a careful reading of those words in the overall structure of limb (b), this court forms the view that those examples must refer to the 'legal document or instrument evidencing title or interest in' due to the use of comma before and after the words 'such assets' in the middle of the provision. If those examples were intended to provide description of examples of 'such assets' then those examples would have found a more natural place in limb (a). Since that was not done by the legislators, then they must have been intended to serve as examples of the legal documents and instruments since those examples fit into the description of money instruments (see *Banking Law*

at p 403). That being the case, it is this court's view that those examples serve only to provide the types of legal documents or monetary instruments that evidence the title or interest in any asset of a respondent in limb (a).

[72] It is pertinent to also point out that s 3 of the Financial Services Act 2013 defines 'deposit' as 'a sum of money accepted or paid on terms under which it will be repaid in full, with or without interest or any other consideration in money or money's worth, either on demand or at a time or in circumstances agreed by or on behalf of the person making the payment and the person accepting it ...'. Nowhere does the definition include a bank account. It refers to the funds that were paid, not the facility into which they were paid.

[73] Therefore, those examples cannot include a bank account since a bank account is not a monetary instrument and neither is it a legal document. The principle of *ejusdem generis* presupposes the identification of a like group of matters (see *Menteri Hal Ehwal Dalam Negeri v Raja Petra bin Raja Kamarudin* [2009] 4 MLJ 484; [2009] 3 CLJ 513).

[74] To add, the application of the principle *expresso unius est exclusion alterius* in the interpretation of statute which means express mention of one thing implies the exclusion of another thing not so mentioned, further excludes a bank account from those examples (see *Bungsar Hill Holdings Sdn Bhd v Damansara Realty Bhd* [2019] MLJU 222; [2019] 4 CLJ 429 and *Jamaluddin bin Mohd Radzi & Ors v Sivakumar a/l Varatharaju Naidu (claimed as Yang Dipertua Dewan Negeri Perak Darul Ridzuan), Election Commission, intervener* [2009] 4 MLJ 593; [2009] 4 CLJ 347).

Can a bank account be a subject of forfeiture?

[75] To conclude the discussion on the definition of 'thing' and 'property' and the position of a bank account under ss 3 and 56(1)(d) AMLFTA, this court's findings are hereby summarised as follows:

(a) a bank account is not a 'thing' under the limb (a) of the definition of 'instrumentalities',

(b) whilst cash standing credit in a bank account is an asset and a property, a bank account on the other hand is not an 'asset' under limb (a) to the definition of 'property';

(c) a bank account is not a 'legal document or instrument' or 'deposits and other financial resources' under limb (b) to the definition of 'property'; and hence,

(d) a bank account is not a 'property' under s 3; and it further follows therefore,

(e) a bank account is not 'instrumentalities of an offence' under ss 3 and 56(1)(d); and finally,

(f) a bank account cannot be the subject of forfeiture under s 56(1)(d) of the AMLFTA.

What is the unlawful activity?

[76] Section 56(1)(d) provides that property may be forfeited when: (a) the property is an instrumentality of an offence; and (b) when the instrumentality is used in or in connection with the commission of an unlawful activity.

[77] Therefore the burden is on the applicant to prove, on the balance of probabilities, that the disputing respondents had committed an unlawful activity and in committing that unlawful activity the property which is the subject of the forfeiture application was instrumentally used in the commission of the offence. That unlawful activity serves as the predicate offence upon which the application for forfeiture rests (see *Badan Perhubungan Umno Negeri Pahang v Public Prosecutor and other appeals* [2022] 2 MLJ 572; [2022] CLJ 364).

[78] 'Unlawful activity' is defined under s 3 of the AMLFTA to mean, inter alia, 'any activity which constitutes any serious offence'. The term 'serious offence' refers to all those offences specified under the Second Schedule of the AMLFTA which includes ss 4, 4A and 4B of of the CGHA.

[79] It is the applicant's contention as appearing in encls 2 (affidavit of Syafinas bt Shabudin) and 395 (further written submission by applicant) that the constituent predicate offence committed by each of the disputing respondents relates to online gambling under s 4B of the CHGA where they had monies relating to online gambling paid into and paid out from the bank accounts. With regards to respondent 102 specifically, it was contended that respondent 102 had the benefit of releasing the property from a loan using unlawful proceeds from online gambling originating from respondent 1, 83 and 91. It was submitted that online gambling is an unlawful activity and those monies and property constituted 'proceeds of unlawful activity' as defined under s 3 of the AMLFTA.

[80] This court takes judicial notice that s 4B of the CGHA has been consistently used by the authorities in arresting suspects allegedly involved in illegal online gambling (see https://www.nst.com.my/news/2015/10/15-involved-online-gambling-detained; https://www.thesundaily.my/home/

four-men-nabbed-in-online-gambling-raids-IY8221831; https://www.newsarawaktribune.com.my/fined-rm10000-each-for-illegal-online-gambling/). However, a careful reading and consideration of s 4B of the CGHA leads this court to question the legal basis for using s 4B in establishing the offence of online gambling. The reasons for this will unfold in the following deliberations.

[81] It is necessary to first delve into the scheme of s 4 of the CGHA and find if s 4B do provide for the offence of online gambling. Section 4 of the CGHA consists of three parts: ss 4, 4A and 4B. Now, s 4 principally refers to gaming places and offences relating to persons who own or permit a place to be used for gaming or has care and management of that place; s 4A refers to public lottery and the offence of promoting public lottery; and lastly s 4B refers to gaming machines and the offence of dealing with and transacting in gaming machines.

[82] Interestingly enough, CGHA does not have any specific provision on online gambling and because of that the term 'online gambling' is not defined. This led the Federal Court in *Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals* [2022] 3 MLJ 203; [2022] 3 CLJ 177 to express a definition to that term to mean something that:

> envisages a gambling service accessed remotely ie, online, through the internet where the participants gamble by depositing funds and playing games of chance, like sports betting, online poker, etc.

[83] It is quite obvious, that despite the government's ongoing war against illegal gambling both the CGHA and the Betting Act 1953 have not caught up with the times and they have not been updated to include express provisions for making online gambling illegal. The various reports in public media show that the authorities have been consistently using the provisions of CGHA to charge the architects and members of online gambling syndicates. This court takes judicial notice that based on reports in the public media the authorities have relied on s 4(1)(a), (b), (c) and/or (g) of the CGHA in investigating and in filing charges against members of online gambling syndicates.

[84] Apart from those provisions, the Prevention of Crimes Act 1953 ('POCA') has also been used to detain persons involved in online gambling (see *Lan Limiao & Ors v Inspector Mohammad Hafifi bin Zailan & Ors* [2020] MLJU 130; [2020] 1 LNS 2205, *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759 ; [2021] 5 CLJ 581, *Li Shishun v Osman Affendi bin Mohd Shalleh & Ors* [2021] MLJU 1292; [2021] 9 CLJ 789, *Chen De Wei v Lembaga Pencegahan Jenayah & Ors* [2021] MLJU 1912; [2021] 1 LNS 1490, *Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals* [2022] 3 MLJ 203; [2022] 3 CLJ 177). Whilst the Federal Court in *Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and*

other appeals had the opportunity to consider whether online gambling is an organised crime in the context of POCA, the court did not deliberate on whether it was legally sustainable to use s 4B of the CGHA in establishing online gambling for the purposes of an application under POCA.

[85] In relation to AMLFTA, the case of *Public Prosecutor v Woo Lee Lee* [2021] MLJU 1369; [2021] 1 LNS 1203 saw the use of s 4B of the CGHA as the predicate offence in an application for forfeiture under s 56(1)(c), that is proceeds of an unlawful activity.

[86] Focusing on s 4B of the CGHA, it provides:

> Offences relating to dealing in gaming machines
>
> Any person who —
>
> (a) deals with or in any manner whatsoever transacts in, any gaming machine or any part of any gaming machine or any interest of any kind in any gaming machine or any replacement part for any gaming machine; or
>
> (b) imports, manufactures, assembles, supplies, sells, assigns, charges, leases, hires, services, repairs, adapts or modifies, or carries out any combination of those activities in relation to, a gaming machine or any part of any gaming machine or any replacement part for any gaming machine,
>
> shall be guilty of an offence and shall, on conviction, be liable to a fine of not less than ten thousand ringgit and not more than one hundred thousand ringgit for every gaming machine seized and shall also be punished with imprisonment for a term not exceeding five years.

[87] That provision criminalises any act of, inter alia, dealing with, transacting in, importing, manufacturing, selling, servicing and repairing gaming machines or the combination of them. What is plainly clear s 4B only deals with the subject of dealing with or transacting in gaming machines and nowhere does it relate to online gambling. To put it simply, it does not provide for the offence of online gambling.

[88] It is this court's view neither s 4B(a) nor (b) can be legitimately used to establish the offence of online gambling. The language used in that provision is so plain and clear that it is incapable of conveying any other meaning beyond what it provides. *Black*'s defines 'deaf' to mean 'an act of buying and selling distribute; an arrangement for mutual advantage; to distribute something; to transact business with; to conspire with', whilst the word 'transact' is defined as 'to carry on or conduct negotiations or business to a conclusion'. Thus the words 'deals with' and 'transacts in' in s 4B must refer only to acts concerned with the business of trading in or servicing the machine or instrument used in gaming but not the act of gaming.

[89] It would be apt for the sake of discussion on this point to refer to an article titled *Online Gambling in Malaysia: A Legal Analysis* (Pertanika Journal of Social Sciences and Humanities 29(1):2017-220 (2021) written by a group of academicians from the Faculty of Law, Multimedia University, Melaka, Malaysia (Guru Dhillon, Lee Sook Ling, Maran Nandan, and Jason Tze-Xi Nathan) where the issues pertaining to online gambling under the current laws in Malaysia were discussed. With regards to s 4B the authors opined as follows:

> Section 4B of the CGHA 1953 provides the punishment of a fine or imprisonment for any person found guilty of committing an offence by transacting or dealing with a gaming machine of any form in any manner. Section 6 (1) of the CGHA 1953 on the other hand also provides the punishment of fine or imprisonment to persons found guilty of patronising a common gaming house as defined by the CGHA 1953.
>
> While these provisions are clearly applicable to gamblers who patronise gambling operations with a physical location ... it is unclear whether this provision can be deemed to be applicable to online gamblers who do not gamble in a physical gaming house. lf we delve further into the CGHA 1953, the wordings of the relevant provisions are wide enough to be reasonably interpreted as applicable to online gamblers who are not physically in the gaming house.
>
> ...
>
> The definition of the gaming machine according to Section 2 of the CGHA 1953 is so broad and encompassing that it can arguably be interpreted to include privately owned mobile phones that have been used by gamblers to gamble online even without being present in a common gaming house and hence be liable for an offence under Section 4B of the CGHA 1953.

[90] With respect, this court cannot share the same view for the reason that the authors had overlooked to construe s 4B of the CGHA in the context of its provision that is, the subject of dealing and transacting in gaming machines. Section 4B cannot be read together with s 2 to support the proposition that perhaps the offence of online gambling can be established simply because s 4B is a standalone provision unrelated to the act of gaming. It is totally divorced from ss 4, 6 and 7 of of the CGHA which are related to the act of gaming. Had the acts in s 4B intended by the legislators to mean gaming then the provisions would have been more at home under ss 4, 6 or 7. Since that was not done, therefore s 4B cannot be used for any other purpose not expressly provided by the law.

[91] To conclude the discussion on this point, this court finds that s 4B(a) and (b) of the CGHA are not provisions of the law that establishes the offence of online gambling and a reliance on the same for that purpose would be misconceived, a misapplication of the law and hence, illegal. It follows also s 4B cannot be used to establish any offence related to receipt of or paying out any monies arising from online gambling.

[92] Before leaving this part of the grounds of judgment, it would be amiss if the decision in *Public Prosecutor v Woo Lee Lee* is not given some discussion since it relates to the matters considered in this decision. In that case the applicant had relied on s 4B of the CGHA to establish the predicate offence. Of particular note, the applicant sought to forfeit monies standing credit in a number of accounts belonging to the respondent and not the accounts in which the monies are deposited. The respondent was said to have operated an online gambling center using gaming simulators at an unlicensed premise. The court there found that, on the balance of probabilities, the applicant had proven that the monies sought to be forfeited were proceeds of an unlawful activity. Whilst the learned judicial commissioner noted that the applicant had relied on s 4B of the CGHA relating to gaming machines, the proof of the predicate offence by the applicant took a sharp slant towards showing online gambling. Thus the monies sought to be forfeited were described as proceeds of an unlawful activity flowing from the operation of an online gambling center instead of dealing with or transacting in gambling machines. The court nonetheless agreed that the predicate offence under section 4B of the CGHA for online gambling was established although there were no facts establishing the offence of dealing with or transacting in gaming machines. Thus, in this court's respectful view, that decision should not be taken as holding that s 4B of the CGHA can be used in establishing the offence of online gambling since it was not an issue that was considered by the court and therefore, should be confined to its facts.

CONSIDERATION OF THE PREDICATE OFFENCE AND THE EVIDENCE

[93] We now come to the crux of this application. The affidavits of the Predicate Offence Investigating Officer (encl 3) and the AMLFTA Investigating Officer (encl 8) attempted to disclose the trail of monies to and from each of the disputing respondents and non-disputing bank accounts to other respondents' bank accounts which allegedly showed their individual and collective involvement in the unlawful activity of online gambling in contravention of s 4B of the CGHA. With regards to the disputing respondents (with exception to respondent 102) copies of the relevant statements of bank accounts are exhibited as 'SK79' for respondent 28, 'SK-100' for respondent 35, 'SK123' for respondent 43, 'SK197' for respondent 68 and 'SK203 for respondent 70.

[94] Forensic analysis revealed screenshots of computer and mobile phones screenshots showing references to different online gambling games and payment instructions (exh 'MFMK3'). An investigation into the computers and mobile devices by the Gaming Expert confirmed that these devices and its contents were used to participate in online gambling (exh 'MFMK4').

[95] In addition, statements were recorded from some of the owners of the respondent entities under s 32 of the AMLFTA who had admitted to participating in online gambling (see exh 'SK102' with regards to respondent 35, exh 'SK125' with regards to respondent 43, and exh 'SK205' with regards to respondent 70). These statements appears to confirm payment of monies to or from other disputing and non-disputing respondents showing the web of payment transactions between different entities that are supposedly linked by one common purpose, that is online gambling (encl 95 exh 'SK102' on payments by respondent 35 to respondents 1, 2, 3 and 40; encl 106 exh 'SK125' on payments by respondent 43 to respondent 1; and encl 106 exh 'SK205' on payments by respondent 70 to respondents 38, 43, 65 and 91).

[96] With regards to respondent 102, it was disclosed in encl 8 that she had taken a loan totaling RM2.5m from respondent 83 ('loan'). The loan was for the purpose of settling an earlier loan that she had taken from other individuals for business purposes in Cambodia ('original loan'). To secure the loan, the property was collateralised via an option agreement dated 21 January 2019. RM500,000 of the loan came from respondent 1 via two Maybank cheques whilst the balance RM2m came from respondent 91 via four Maybank cheques and five Hong Leong Bank cheques. All these monies were firstly paid to a solicitor's firm who then released these monies to the original lenders towards full settlement of the original loan (exh SK287, encl 8). It is the applicant's case that the loan came from unlawful proceeds of online gambling and it was used to either purchase the property or release the same from an encumbrance under the original loan (see paras 26 and 29, written submission of applicant). Therefore the property is said to be an instrument in the commission of an unlawful activity related to online gambling under s 4B of the CGHA or acquired using unlawful proceeds.

[97] After perusing encls 2, 3 and 8 and all the evidence, it is clear to this court that the entire evidence presented relate only to the acts of alleged online gambling and nothing directly or remotely related to dealing with or transacting in gaming machines under s 4B of the CGHA. It must be pointed out that in encl 3 the Predicate Offence Investigating Officer stated:

(a) a raid was done on a premises at No 1096-3A, Jalan Sentul, Sentul, Kuala Lumpur on suspicion that the premises was used as an online gambling call center;

(b) the police report shown as exh 'MFMK1' states that the report was made pertaining to online gambling;

(c) that respondent 5 was responsible as the manager of the call center, recruiting new members and promoting the different online gambling games whilst respondent 6 was responsible for managing the credits used in playing the online gambling games. A person by the name of Kor Kah

Ho who is not a respondent in the application was responsible in supervising respondent 5 and 6; and

(d) both respondents 5 and 6 were subjected to Police Supervision Orders under s 15 of the POCA for having been involved in the management of an online gambling call center and promoting online gambling whilst Kor Kah Ho was charged under s 4(1)(g) of the CGHA for the offence of promoting online gambling using three computers. He pleaded guilty and was sentenced to payment of RM20,000 fine.

[98] None of those facts disclosed any offence committed by the respondent 5, 6 and Kor Kah Ho under s 4B of the CGHA. In fact, Kor Ah Ho was not even charged under s 4B of the CGHA.

[99] Therefore, this court is constrained to state any less than that the applicant has failed to apply the correct law in proving the predicate offence that was to serve as the basis for the application. Whilst this court shares the applicant's and the government's abhorrence to online gambling as the new evil that the Malaysian society will have to constantly battle, the law as it stands currently do not provide the authorities with the correct legislative tools to battle online gambling. Section 4B of the CGHA is legally inapplicable and irrelevant to serve as the penal provision on online gambling. The use of that provision to support any persecution and any proceedings under AMLFTA and other laws such as POCA for alleged offences of online gambling is misconceived, a misapplication and an abuse of the law. On equal footing, limb (b) to the definition of 'unlawful activity' cannot assist the applicant in proving the existence of the offence, since there is no offence against online gambling under s 4B nor other parts of s 4 of of the CGHA.

[100] In interpreting and applying the laws as they stand, it is not the function and duty of this court to fill in the blanks in the law when the legislators who have the power to do so have yet to rise to the task. This court takes judicial notice that despite the announcement by the then Deputy Prime Minister Datuk Seri Zahid Hamidi back in 2017 that amendments to the CGHA had been drafted and will be tabled in Parliament in the month of March that year, no further developments took place (see https://www.malaymail.com/news/malaysia/2017/02/14/dpm-common-gaming-houses-act-1953-to-be-amended/1314863). Then in 2019 the then Home minister, Tan Sri Muhyiddin Yassin informed the Dewan Rakyat that laws on online gambling were being reviewed to make it more current and effective (see https://www.nst.com.my/news/ government-public-policy/2019/07/502989/muhyiddin-illegal-gambling-laws-under-review). Two years later saw a change in position when in 2021 it was reported that the government was considering the idea of legalising online gambling (see https://www.nst.com.my/news/nation/2021/11/745549/govt-mulls-legalising-online-gambling).

Such is the current state of affairs on the CGHA and online gambling. A

[101] It is established law that where the words and language used in a statutory provision is clear and unambiguous then the court must apply its plain and ordinary meaning. When a question of statutory interpretation arises the duty of the court is to give effect to the will of Parliament. The Federal Court in *Tan Boon Kean v Public Prosecutor* [1995] 3 MLJ 514; [1995] 4 CLJ 456 held: B

> On interpretation of statutes, the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in any gaps disclosed (see *Magor & St Mellons Rural District Council v Newport Borough Council* [1952] AC 189 at p 191; [1951] 2 All ER 839 at p 842.) The court has no power to change any words used by the legislature. Further, where the words are simple and clear, it is the duty of the court of law to give these words their natural meaning even though such interpretation leads to apparent anomalies. C D

[102] In this court's view there is no ambiguity as to the meaning and application of s 4B of the CGHA, that is the dealing with and transacting in gaming machines. There is no legal justification to read into s 4B anything more to say that it can be used to establish the offence online gambling. It is trite law that penal provisions must be construed strictly. In Federal Court decision in *Public Prosecutor v Datuk Tan Cheng Swee & Ors* [1979] 1 MLJ 166, Chang Min Tat FJ expressed the following: E

> James LJ in *Dyke v Elloitt*, *The Gauntlet* (1872-4) AC 184 at p 191 in delivering the judgment of their Lordships of the Privy Council observed: F
>
> > No doubt all penal statutes are to be construed strictly, that is to say, the court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a casus omissus, that the thing is so clearly within the mischief that it must have been intended to be included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair commonsense meaning of the language used, and the court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument. G H
>
> The Supreme Court of India has in *M Narayanan Nambiar v State of Kerala* AIR 1963 SC 1116 at p 1118 described this view as the correct perspective and with respect, we would adopt this approach in the interpretation of a statute ... I

[103] The fact that some of the disputing respondents and non-disputing respondents may have admitted to participating in online gambling and that

their accounts had been used to serve that activity, does not make those admissions proof of the commission of online gambling under s 4B of the CGHA.

CONCLUSION

[104] After considering: (a) all the affidavits in support of the application, affidavits by the disputing respondent; (b) both written and oral submissions by parties on issues of facts and law; (c) and the evidence, this court cannot arrive at any other conclusion than to find that the application was legally flawed in more than one way and therefore must fail.

[105] Firstly, as discussed earlier, a bank account is not a 'thing' or 'property' that can legally be an instrumentality of offence under s 3 of the AMLFTA. Since a bank account cannot be an instrumentality of an offence, therefore the bank accounts in this application cannot legally be the subject of a forfeiture under s 56(1)(d). The question whether the facts in this application show that the bank accounts are instrumentalities of an offence, therefore, does not at all arise for consideration.

[106] Secondly, there was a serious misapplication of the law in relying on s 4B of the CGHA to prove the predicate offence of online gambling. Since s 4B of the CGHA cannot be relied on as the penal provision establishing the offence of online gambling, it cannot be said that there has been the receipt of and payment out of unlawful proceeds from the bank accounts arising from online gambling. It is the applicant's legal burden to prove their case that, on the balance of probabilities, the monies which were paid into and from the bank accounts were proceeds of an unlawful activity relating to online gambling under s 4B of the CGHA. Since the proving of the unlawful activity stood on a wrong footing of the law, the applicant failed in discharging that legal burden. Thus the applicant has failed, on the balance of probabilities, to prove against each of the disputing respondents (and the non-disputing respondents, for that matter) the predicate offence of online gambling under s 4B of the CGHA and the commission of an offence under s 4(1) of the AMLFTA. In delivering the decision of the Federal Court in *Public Prosecutor v Kuala Dimensi Sdn Bhd & Ors*, Hasnah Hashim FCJ stated:

> [39] The provision of s 56 of the AMLATFA does not absolve the prosecution from proving on a balance of probabilities that the properties seized under the purview of the Act were procured as a result of or in connection with an illegal activity or transaction. The PP must be able to prove that the properties seized were procured in connection with the commission of the predicate offence.
>
> [42] Even on the balance of probabilities it is nevertheless incumbent upon the prosecution in an application for forfeiture under s 56 of the AMLATFA to prove the following:

(a) the existence of a predicate offence, the evidence and basis upon which the commission of the offence has been established;

(b) identify the proceeds or 'the subject-matter of' the predicate offences; and

(c) the manner the respondents have abetted or participated in the commission of the predicate offence.

[107] Since the offence of online gambling under s 4B of the CGHA has not been proven then this court's findings on the issue shall equally apply to the respondent 102. However, for the sake of a complete deliberation on the issues relating to respondent 102 specifically, this court states that it is clear from the applicant's own evidence in exh SK287 of encl 8 that: (a) the property was acquired by respondent 102 much earlier back in 2014 financed by Alliance Bank Bhd; and (b) the loan was granted by respondent 83 much later in 2019 as evidenced by the option agreement between respondent 102 and 83. Therefore the loan had no role in the acquisition of the property. This was also confirmed by the affidavit of the AMLFTA Investigating Officer at para 422 of encl 8 which stated that the loan was only used to settle the original debt and release the property from the encumbrance under the original loan. What then is the link of the property to the commission of an offence of online gambling? There is no evidence that respondent 102 had used or permitted to be used the property towards the commission of online gambling. Neither was the property used as a premise for online gambling nor was it used as collateral toward raising monies used in online gambling. There is also no evidence how respondent 1, 83 and 91 had used that property as an instrument in the commission of online gambling. As discussed earlier, for a property to be an instrument of an offence, there must be a direct and substantial link between the use of the property and the commission of the offence. This court does not agree that by the mere fact the loan was given to respondent 102 to settle the original loan and then collateralised under an option agreement, the property must necessarily then be entangled as an instrument of an offence. In this court's view that fact does not serve as the causal link or nexus between the property and the commission of an offence of online gambling. In any event, since the applicant failed in proving the predicate offence, then there is no instrument of offence to speak of. Hence, the application for forfeiture of the property must also fail.

DECISION

[108] Therefore, this court finds, on the balance of probabilities, that the applicant has failed to prove its case against each of the disputing respondents warranting the exercise of this court's powers under s 56(2) of the AMLFTA. The application for an order for forfeiture under s 56(1)(d) of the AMLFTA against: (a) all the disputing respondent's bank accounts and in any case, all monies in those bank accounts; and (b) the property, is hereby denied. Prayer

3 (which should have been typed as '2' in encl 1) is dismissed.

[109] Notwithstanding that the non-disputing respondents took no action to challenge this application, this decision shall also apply for their benefit since the duty of this court under s 56(4) of the AMLFTA demands equal consideration whether the bank accounts belonging to the non-disputing respondents can be for forfeited under limb (d). Furthermore there is no provision in the AMLFTA empowering this court to grant the application in default of any challenge or dispute. In any event, the granting of such a default order when this court has found no legal basis for the application to be brought in the first place will cause great injustice to the non-disputing parties.

[110] Therefore, this court also finds, on the balance of probabilities that the applicant has failed to prove its case against each of the non-disputing respondents. The application for an order for forfeiture against: (a) all the non-disputing respondent's bank accounts and in any case, all monies in those bank accounts under s 56(1)(d) of the AMLFTA is hereby denied. Prayer 3 as far it relates to the non-disputing respondents (which should have been typed as '2' in encl 1) is dismissed.

[111] This court further orders that all the seizure orders dated 27 September 2019, 12 November 2019 and 4 February 2020 against all monies in each of the bank accounts held under the names of the respective disputing respondents and non-disputing respondents in the respective financial institutions as listed in the Appendix attached hereto be immediately revoked and consequent thereto, access to each of those accounts be immediately given to the each of account holders.

[112] It is also ordered that the seizure order dated 4 February 2020 against the property known as Lot 170 (No 46) Jalan Cinta Alam, Country Heights, 43000 Kajang, Selangor, held under title GRN 222387 Lot 21834, Bandar Country Heights, Daerah Kuala Langat, Negeri Selangor be immediately revoked and forthwith released to respondent 102, Lau Yong Ying (NRIC: 770501–05–5546).

FINAL REMARKS

[113] In concluding this grounds of judgment, this court wishes to express its appreciation to both the deputy public prosecutor for the applicant and learned counsels for the disputing respondents for their professional conduct in the proceedings before this court. Whilst disagreements between counsels can never be absent in any contentious proceedings, they were handled with good courtesy and mutual respect. A note of appreciation is also expressed for all the research and laborious effort put in by parties to produce affidavits and written

submissions that made this court's task in evaluating relevant issues easier to perform. Lastly, this court expresses its gratitude to counsels for the respect and patience shown to this court throughout the proceedings. The hallmarks of good court etiquette by counsels is in showing the necessary respect and patience towards the presiding judge and process of justice and it must be said that in this case those qualities were certainly not lacking.

APPENDIX

No	Respondent	Bank Account
1	4	Current account number 157175208676 held under the name of Wong Boon Choong (NRIC No 781022–07–5287) at Maybank Islamic Bhd, Jalan Ong Yi How Branch, Butterworth Pulau Pinang was seized on 27 September 2019.
2	6	Saving account number 10114700298584 held under the name of Ooi Qi Hao (NRIC No 860912–23–6789) at RHB Bank Bhd, Johar Bahru Branch, Johar was seized on 27 September 2019 .
3	7	(i) Current account number 512503223183 held under the name of KOS Advertising Sales & Promotions (Business Registration No JM0779874T) at Malayan Banking Bhd, Bandar Baru Selayang Branch, Batu Caves, Selangor was seized on 27 September 2019. (ii) Current account number 21210700054875 held under the name of KOS Advertising Sales & Promotions (Business Registration No JM0779874T) at RHB Bank Bhd, Selayang Branch, Kuala Lumpur was seized on 27 September 2019; (iii) Cureent account number 8008412684 held under the name of KOS Advertising Sales & Promotions (Business Registration No JM0779874T) at CIMB Bank Bhd, Selayang Branch, Selangor was seized on 27 September 2019; and (iv) Current account number 26900019119 held under the name of KOS Advertising Sales & Promotions (Business Registration No JM0779874T) at Hong Leong Bank Bhd, Selayang Branch, Selangor was seized on 27 September 2019.
4	9	Current account number 514440539291 held under the name of ENK Trading & Services (Business Registration No 002806486W) at Malayan Banking Bhd, Jalan Kuchai Lama Branch, Kuala Lumpur was seized on 27 September 2019.

5	14	Current account number 28100017407 held under the name of Focus Era Fashion (Business Registration No 002580329M) at Hong Leong Bank Bhd, Petaling Jaya Branch, Selangor was seized on 27 September 2019.
6	15	Current account number 075303115108 held under the name of Low Wai Khim (NRIC No 650216–08–5598) at HSBC Bank Bhd, Juru Branch, Penang was seized on 27 September 2019.
7	21	Current account number 7062730477 held under the name of Yap Siew Chin (NRIC No 610829–10–5620) at CIMB Bank Bhd, KLCC Branch, Kuala Lumpur was seized on 27 September 2019.
8	24	Current account number 19401012203 held under the name of CJ Marketing And Services (Business Registration No 001750277-U) at Hong Leong Islamic Bank Bhd, Bandar Baru Seri Petaling Branch, Kuala Lumpur was seized on 27 September 2019.
9	25	Current account number 19401013185 held under the name of Acewell Marketing Services (Business Registration No 002611837M) at Hong Leong Bank Bhd, Bandar Baru Seri Petaling Branch, Kuala Lumpur was seized on 27 September 2019 .
10	26	Current account number 564119110063 held under the name of LS Multilink Logistic (Business Registration No 001818353V) at Maybank Islamic Bhd, Jalan Klang Lama Branch, Kuala Lumpur was seized on 27 September 2019.
11	27	Current account number 26700017218 held under the name of Double Mix Enterprise (Business Registration No UT0012840K) at Hong Leong Bank Bhd, Malacca Raya Branch, Malacca was seized on 27 September 2019.
12	28	Current account number 514833408665 held under the name of A 1 Plus Trading (Business Registration No 002563000M) at Malayan Banking Bhd, Kinrara Branch, Puchong, Selangor was seized on 12 November 2019.
13	31	Current account number 562085613260 held under the name of Autumnscape Sdn Bhd (Company No 1243677W) at Maybank Islamic Bhd, Subang Perdana Branch, Shah Alam, Selangor was seized on 12 November 2019.
14	32	Current account number 551089344492 held under the name of Bee Yin Kee Enterprise (Business Registration No JR0050488H) at Maybank Islamic Bhd, Tangkak Branch, Johor was seized on 12 November 2019.

15	33	Current account number 501123636034 held under the name of Biz Utama Trading (Business Registration No JM0666589K) at Malayan Banking Bhd, Jalan Tebrau Branch, Johor Bahru, Johar was seized on 12 November 2019.
16	35	Current account number 514280616772 held under the name of CT 8 Trading (Business Registration No 002888477K) at Malayan Banking Bhd, Taman Segar Branch, Cheras, Kuala Lumpur was seized on 12 November 2019.
17	37	Current account number 552059688234 held under the name of name of Cyw Agency Enterprise (Business Registration No PG0314108T) at Maybank Islamic Bhd, Sungai Petani Branch, Kedah was seized on 12 November 2019.
18	38	Current account number 507143418689 held under the name of DC Watch Trading (Business Registration No PG0451001H) at Malayan Banking Bhd, Tanjung Bungah Branch, Penang was seized on 12 November 2019.
19	39	Current account number 511065556304 held under the name of Dluxe Company (Business Registration No BTU1462015) at Malayan Banking Bhd, Bintulu Branch, Sarawak was seized on 12 November 2019.
20	41	Current account number 507424639514 held under the name of Emerald Software Trading (Business Registration No PG046651OK) at Malayan Banking Bhd, Queensbay Mall Branch, Bayan Lepas, Penang was seized on 12 November 2019.
21	42	Current account number 514178644483 held under the name of EZR Marketing (Business Registration No 002648400V) at Malayan Banking Bhd) SEA Park Branch, Petaling Jaya, Selangor was seized on 12 November 2019.
22	43	Current account number 514758309924 held under the name of Farnod Wealth Advisory Management (Business Registration No 002476426T) at Malayan Banking Bhd, Taman Cheras Makmur Branch, Kuala Lumpur was seized on 12 November 2019.
23	46	Current account number 512259565478 held under the name of FW Solution Marketing (Business Registration No 002835892K) at Malayan Banking Bhd, Pandan Jaya Branch, Kuala Lumpur was seized on 12 November 2019.

24	48	Current account number 564409613098 held under the name of GA Plus Industries Sdn Bhd (Company No 1109829T) at Maybank Islamic Bhd, Taman Maluri Branch, Kuala Lumpur Jaya was seized on 12 November 2019.
25	57	Current account number 557326059140 held under the name of JNT Smart Best Enterprise (Business Registration No PG0443383H) at Maybank Islamic Bhd, Alma Branch, Penang was seized on 12 November 2019.
26	60	Current account number 558033612802 held under the name of Lee Chai Enterprise (Business Registration No IP0466554P) at Maybank Islamic Bhd, Pasir Putih Branch, Perak was seized on 12 November 2019.
27	61	Current account number 512848540222 held under the name of Meizii Star Enterprise (Business Registration No SA0485174D) at Malayan Banking Bhd, Setia Alam Branch, Shah Alam, Selangor was seized on 12 November 2019.
28	66	Current account number 514392510421 held under the name of Pusat Perabot Li Tin Shi Ji (Business Registration No SA0105317P) at Malayan Banking Bhd, Bandar Sri Damansara Branch, Kepong, Selangor was seized on 12 November 2019.
29	67	Current account number 514280512363 held under the name of Pyte Trading (Business Registration No 001326484U) at Malayan Banking Bhd, Taman Segar Branch, Kuala Lumpur was seized on 12 November 2019.
30	68	Current account number 557018558600 held under the name of Quarter Mile Trading (Business Registration No PG0402869K) at Maybank Islamic Bhd, Penang Main Branch, Penang was seized on 12 November 2019.
31	69	Current account number 554026280843 held under the name of SS Low Trading (Business Registration No UT00211230) at Maybank Islamic Bhd, Melacca Main Branch, Melacca was seized on 12 November 2019.
32	70	Current account number 514132532030 held under the name of Sunrise Pacific Marketing (Business Registration No 002543296H) at Malayan Banking Bhd, Taman Midah Branch, Cheras, Kuala Lumpur was seized on 12 November 2019.

33	71	Current account number 502090623802 held under the name of Taste Of Galaxy Trading (Business Registration No KV0017162H) at Malayan Banking Bhd, Mergong Branch, Alor Setar, Kedah was seized on 12 November 2019.
34	76	Current account number 508038613890 held under the name of TF Kong Enterprise (Business Registration No IP0457312X) at Malayan Banking Bhd, Pasir Putih Branch, Perak was seized on 12 November 2019.
35	77	Current account number 552022620343 held under the name of TK Keong Engineering Works (Business Registration No AS0374742A) at Maybank Islamic Bhd, Alor Setar Branch, Kedah was seized on 12 November 2019.
36	78	Current account number 506070510620 held under the name of TSM 99 Renovation (Business Registration No CT0061992T) at Malayan Banking Bhd, Triang Branch, Pahang was seized on 12 November 2019.
37	79	Current account number 502036104582 held under the name of V Will Marketing (Business Registration No 002036709W) at Malayan Banking Bhd, Kulim Branch, Kedah was seized on 12 November 2019.
38	86	Current account number bernombor 512978009774 held under the name of Asia Tank Tuna Sdn Bhd/Asia Tank Trading (M) Sdn Bhd (Company No 903405V) at Malayan Banking Bhd, Ara Damansara Branch, Petaling Jaya, Selangor was seized on 12 November 2019.
39	87	Current account number 514767319898 held under the name of Take Five Idea Sdn Bhd (Company No 917048P) at Malayan Banking Bhd, Bandar Sri Permaisuri Branch, Kuala Lumpur was seized on 12 November 2019.
40	95	Current account number 21212500173354 held under the name of Sinar Juara Trading & Supplies (Business Registration No 002079258A) at RHB Bank Bhd, IOI Mall Branch, Puchong, Selangor was seized on 12 November 2019.
41	98	Current account number 21010300031131 held under the name of Fullplan Resources Sdn Bhd (Company No 1092240-H) at RHB Bank Bhd, Lintas Station Complex Branch, Luyang, Kata Kinabalu, Sabah was seized on 4 February 2020.

Order accordingly.

Reported by Ashok Kumar